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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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4 UNITED STATES OF AMERICA, New York, N.Y.

5 v. 18 Cr. 0036 (JPO)

6 DAVID MIDDENDORF and JEFFREY
7 WADA,

8 Defendants.
9 -----x

10 February 27, 2019
11 Before:
12 HON. J. PAUL OETKEN,
13 District Judge
14 and a jury
15 APPEARANCES
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18 Southern District of New York
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8 Lyeson Daniel, Postal Inspector
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Peter Urbanczyk, Government Paralegal
10 Nathaniel Cooney, Government Paralegal
Kiezia Girard-Lawrence, Postal Inspector
Stephanie O'Connor, Defendant Middendorf paralegal
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1 (Trial resumed; jury not present)

2 THE COURT: Good morning.

3 MS. MERMELSTEIN: Good morning, your Honor.

4 THE COURT: Any preliminary matters anyone wanted to
5 address?

6 MS. KRAMER: Yes, your Honor. There are two issues
7 that I think are going to require a resolution by the Court.
8 First, on the prior consistent statement of Brian Sweet that
9 your Honor ruled the government could offer, the government
10 produced the redacted version of Government Exhibit 452,
11 leaving unredacted only the prior consistent statement the
12 government seeks to offer. I can pass up a copy, your Honor,
13 or we can put it up on the screen, if you would like.

14 I understand from counsel for defendant Middendorf
15 that they intend -- that they think that the entirety of the
16 notes should come in with the exception of a portion of the
17 second page that appears to be from a different meeting.

18 They should not. The rest of the notes are not
19 necessary to place the portion that we intend to admit into
20 context --

21 THE COURT: You're recalling Mr. Sweet?

22 MS. KRAMER: Yes, your Honor.

23 So could I pass up or could we put up on the screen
24 Government Exhibit 452R, page 1, next to page 2?

25 So, this is what the government intends to offer, your

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Honor, which is limited to the prior consistent statement. The heading on the left page that reflects that Jim and Dave, and then on the second page, the statement that was at issue and was the subject of all the briefing about sort of, if I could read underneath the sort of number 1 heading, "Stonegate/Gray Area/Here to share insights and add value wherever I can." Next line, "Know where paycheck comes from." And then the next line, "Stonegate, Mike Flynn," and then there are some other notations. And then number 5 is "PCAOB contact," which is the other piece that Mr. Sweet testified about, that he was asked to keep his PCAOB contacts, keep in touch with them.

The items that are redacted are -- I can show your Honor, if you would like, but they consist -- just leave this up for a minute -- they consist generally of Mr. Sweet's notes preparing for this meeting, then the portion of the meeting where Mr. Liddy talked to him. And then on the second page, between 1 and 5, are topics 2 through 4, which are other things that Dave Middendorf said during the meeting. And the right side that is redacted are notes from another day.

If your Honor --

THE COURT: I'm sorry. Could you just say what you just said again?

MS. KRAMER: Sure. So looking at the second page, the block on the right side is notes from another meeting, so no one suggested that that should come in. Between 1 and 5 --

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1 could you pull up on the left side 452, page 2, please, and on
2 the right side 452R, page 2.

3 OK. So what you can see, your Honor, on the left side
4 that we've redacted, items 2, 3, 4 and 6, which are other
5 things that Middendorf said to Sweet during this meeting. They
6 are in totally different paragraphs. They were not the subject
7 of his testimony. They are not prior consistent statements.

8 And if your Honor recalls, when I first asked
9 Mr. Sweet do you remember everything that Dave Middendorf said
10 to you in this meeting, he said, no, I don't. I tried to show
11 him this document to refresh his recollection, and defense
12 counsel objected to me even showing him to refresh at this
13 point. We had an argument at sidebar about it, and I was then
14 not allowed to show him to refresh and was required to ask him,
15 you know, what do you remember. He said what he did remember,
16 and then I moved on. He did not testify about items 2, 3, 4 or
17 6, and I believe that -- I suspect that part of the reason that
18 defense counsel wants these other items in under the claim that
19 they're necessary for completeness or to put the notes that we
20 are offering, the prior consistent statement, into context, is
21 so that they can cross-examine Mr. Sweet about not saying or
22 talking about 2, 3 and 4, which is improper because they
23 prevented him from being refreshed on it in the first place and
24 they could have asked him about it on cross and they didn't;
25 and, second, to suggest that Mr. Middendorf also talked to

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1 Brian Sweet about other legitimate things in the meeting, which
2 is essentially other good act evidence that's not relevant.

3 So the rule of completeness is quite limited. And I
4 have a case, your Honor, to pass up to you. It is United
5 States v. Marin, M-a-r-i-n, 689 F.2d -- may we approach, your
6 Honor?

7 THE COURT: Yes.

8 MS. KRAMER: 689 -- I'm sorry, 669 F.2d 73 (2d Cir.
9 1982). And if your Honor turns to it's page 8 in the printout,
10 under the heading "Cede the redacted statement," the Second
11 Circuit approved the district court's decision to not admit
12 into evidence a portion of a prior statement that the defendant
13 wanted to arguably complete or place into context the prior
14 consistent statement that the government was offering.

15 And at the bottom of page 8, the Court said, you know,
16 when the defendant seeks to introduce his own prior statement
17 for the truth of the matter asserted, it is hearsay. I suspect
18 you are going to hear that is not what they are going to offer
19 it for. When the defendant offers his own statement simply to
20 show that it was made, rather than to establish the truth of
21 the matter, the fact that the statement was made must be
22 relevant, and the Court goes on to discuss the rule of
23 completeness doctrine, and makes clear, on page 9, that the
24 rule of completeness does not require introductions of portions
25 of a statement that are neither explanatory nor relevant to the

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1 admitted passages. And this is consistent with the Second
2 Circuit's holding in Kozeny, K-o-z-e-n-y, that the omitted
3 portions must be necessary for context for completeness.

4 In this case, the Second Circuit says, "The
5 completeness doctrine did not require admission of Ramiro's
6 entire statement." the redacted statement omitted all
7 reference to, in this case, a bag, which I would suggest is
8 very similar to the gray area/Stonigate discussion. Paragraph
9 1 here is the entirety of what Mr. Middendorf said on this
10 topic. If we redacted a portion of what is under paragraph 1,
11 so we had some words but not others, then I think that the
12 defense would have a rule of completeness argument. But this
13 paragraph, this subsection 1, stands alone and needs no other
14 explanation.

15 The other things are other topics discussed in the
16 meeting, they do nothing to complete or put into context this
17 statement other than to say he said to you things other than
18 what's here. And that can be accomplished with that single
19 question on cross and pointing out on the redacted version,
20 452R, that you go from number 1 to number 5 and there are other
21 notes in the middle, without walking through
22 statement-by-statement those things.

23 So the same decision that we're asking your Honor to
24 make was upheld in 1982 by the be Second Circuit and has been
25 echoed in similar cases like Kozeny, which is 667 F.3d 122

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1 (2011).

2 THE COURT: Would you like to respond?

3 MS. LESTER: Yes, your Honor.

4 If the Court is willing to give us more time, I
5 haven't yet looked at Marin. We raised this with the
6 government last night but they hadn't yet provided that case
7 cite, but it may not be necessary.

8 Your Honor, our contention is actually that the notes
9 on page 2 do not represent Mr. Middendorf's statements. We
10 intend to cross Mr. Sweet on the entire context of the notes,
11 and we think they need to come in for completeness so that we
12 can establish that there are phrases here that wouldn't
13 naturally reflect -- or we would argue wouldn't reflect
14 statements made by someone else to him.

15 So, for example, in the part that the government
16 believes should come in, which we agree under your Honor's
17 ruling, at the very top: "Slash here to share insights and add
18 value wherever I can" appears to be a statement written by the
19 person who is making that statement, that is, Mr. Sweet. So,
20 we believe that other aspects of the note support that
21 inference, that these are statements that Mr. Sweet was making
22 during the meeting, not statements that Mr. Middendorf was
23 making.

24 So I think that the case that Ms. Kramer cited is --
25 although I haven't read it, it sounds like it may be inapposite

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1 because our contention is these are not in fact
2 Mr. Middendorf's statements. And I think for that reason, for
3 completeness purposes, the entire document, with the exception
4 of the portion on the second page right-hand side, should come
5 in, because that would permit us to question and for the jury
6 to have insight into whether these statements actually reflect
7 statements that were made by someone else or statements that
8 were made by Mr. Sweet or notes to himself in preparation. For
9 example, the part on the first page, I believe he would say, as
10 he said in the 3500 material, that those are his preparation
11 notes.

12 So that is the point in terms of our cross, is that we
13 would like to undermine the assertion by the government that
14 these are Mr. Middendorf's statements, not that we're trying to
15 get additional statements by Mr. Middendorf in.

16 And as to the point that Mr. Sweet didn't testify
17 about some of these sections on direct, we wouldn't intend to
18 ask him in an impeaching fashion, you didn't -- you never said
19 he asked you about the internal inspection process. Again,
20 that's not the goal of our cross-examination. It's to impeach
21 his assertion that these are actually statements made by
22 Mr. Middendorf.

23 THE COURT: So why do you need the others for the
24 purpose you mentioned? You just gave an example of one that
25 the government wants in. Why would you need the other examples

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1 to cast out on whose statements they are?

2 MS. LESTER: So, for example, under 3, "Monthly
3 Meetings," the last dash says, "Dave/Tom/Steve, very good."
4 Our belief is that that relates to a statement Mr. Sweet made
5 to Mr. Middendorf, that is, that Dave, Mr. Middendorf, Tom
6 Whittle and Steve Georgian were very good in those monthly
7 meetings with the PCAOB, that there was a perception that they
8 were on top of it, because if you see on the second dash, it
9 says, "Emphasize tone at top every time." And then the next
10 slash is "leadership attendance." And I believe there's
11 already been evidence at the trial that in an effort to address
12 the "tone at the top" concerns that the PCAOB expressed to
13 KPMG, there was a change in the attendees at the monthly
14 meetings, that is that now Mr. Middendorf began attending and
15 other high-level people within the Audit Group began attending
16 these meetings to emphasize to the PCAOB that they did -- they
17 were taking this tone at the top comment seriously. So our
18 contention is that these are things that Mr. Sweet may have
19 said to Mr. Middendorf, not the reverse.

20 MS. KRAMER: So this is the first we're hearing of
21 this, your Honor. Yesterday the challenge to these was that
22 Mr. Sweet --

23 MS. LESTER: I'm sorry, your Honor. This was in our
24 letter. We specifically pointed to this point of the notes.

25 MS. KRAMER: So, your Honor, this is the first we're

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1 hearing in terms of the reason that this is necessary to place
2 these into context and that these are actually -- any of these
3 are actually Mr. Sweet's notes, because yesterday we were told
4 that perhaps Mr. Sweet went back into his office and wrote
5 these notes after learning of the internal investigation, which
6 is something we're prepared to disprove.

7 But in any event, I think, to Ms. Lester's point,
8 Mr. Sweet can be cross-examined about that based on the portion
9 that we want to offer. And he can be asked about the fact
10 that, as she indicated, what's in this 3500, and has been
11 consistent from the getgo, is that above -- so turn to 452,
12 page 1. So above the line on the first page were his
13 preparation notes. Just zoom out. So above that line, on the
14 top third of the first page, those are his preparation notes.
15 Below that line on the first page, he has been consistent with
16 those are the notes of what Jim Liddy said to him. And then
17 turning to the next page, on the left side of the line are the
18 notes from what Mr. Middendorf said to him. So, the cross can
19 be fully achieved with what we intend to offer without getting
20 into anything else.

21 If your Honor is inclined to -- I mean, first of all,
22 I think when you're writing notes, even when someone else says
23 to you "you should do this," you generally don't write "you,"
24 you write "me" or you substitute the person's name or it
25 doesn't make sense. So I think if your Honor is inclined to

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1 entertain any of the application, then it should be limited
2 only to adding in number 3 from the second page, where it says
3 "Dave/Tom/Steve, very good," so that the second page would
4 include just that bullet point, and none of the rest is
5 relevant even to the point that the defense wants to make.

6 THE COURT: OK. We don't need to decide this right
7 now, do we?

8 MS. KRAMER: So --

9 THE COURT: Schedule wise?

10 MS. KRAMER: No, your Honor, although we do have a
11 second issue that needs to be decided for this afternoon which
12 relates to this, because we're going to be calling a witness
13 who retrieved this notepad and at that point potentially
14 offering subject to connection what we've marked as Government
15 Exhibit 452R. So we don't need to decide the notes issue this
16 morning but we will by lunchtime.

17 And so, relatedly, your Honor, the second issue is
18 that we notified defense counsel that we intend to call this
19 afternoon Mark Rubino, who is associate general counsel at
20 KPMG, to testify only about the fact that he retrieved the
21 notepad that contains these notes from Mr. Sweet's office on or
22 about March 16, 2017, and that's it. And we asked defense
23 counsel to let us know if they think they are entitled to
24 cross-examine him about any other matters beyond that scope,
25 because he did conduct some of the interviews that happened at

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Whittle - cross

1 the beginning part of the internal investigation case before
2 KPMG had outside counsel. We asked defense counsel to notify
3 us if they think they are entitled to cross him on anything
4 beyond that so that we can raise it with your Honor, and
5 counsel for Wada has indicated that they do believe they intend
6 to cross -- they are entitled to cross Mr. Rubino about other
7 topics. We asked what those topics are and we didn't get a
8 response. So that is something that we will need to resolve
9 before we call him and which we expect or hope will be after
10 lunch.

11 THE COURT: OK. Any other issues for now?

12 (Pause)

13 MR. BOXER: No, your Honor.

14 THE COURT: All right. And Mr. Whittle is ready to
15 proceed?

16 Please get the witness.

17 (Witness present)

18 (Continued on next page)

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Whittle - cross

1 (Jury present)

2 THE COURT: Good morning, ladies and gentlemen. You
3 may be seated.

4 You may be seated in the courtroom.

5 We are continuing with the testimony.

6 Mr. Whittle, you were sworn in yesterday. You remain
7 under oath.

8 And, Mr. Boxer, you may proceed.

9 MR. BOXER: Thank you, your Honor.

10 THOMAS W. WHITTLE III,

11 Resumed, and testified further as follows:

12 CROSS-EXAMINATION (Resumed)

13 BY MR. BOXER:

14 Q. Good morning, Mr. Whittle.

15 A. Good morning.

16 Q. I want to start with your testimony yesterday.

17 In 2017, I understand you had a conversation with
18 Brian Sweet about a preliminary list. Do you recall that
19 testimony?

20 A. Yes.

21 Q. And as I recalled it, he contacted you about that list?

22 A. Yes.

23 Q. This was in January of 2017, correct?

24 A. That's correct.

25 Q. And it was before various internal reviews needed to take

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Whittle - cross

1 place at the PCAOB to decide what the actual list would be, is
2 that right?

3 A. I believe that was the process that the PCAOB would go
4 through. They would have some reviews and approvals, yes.

5 Q. And during this conversation, he gave you a list of issuers
6 that were preliminary, in his words, correct?

7 A. That's correct.

8 Q. And this is where you said you didn't ask him for the list,
9 right?

10 A. I did not expressly ask him for the list.

11 Q. But you implicitly, I think was your testimony, you
12 implicitly asked him for the list, correct?

13 A. It was an implicit request for any information that might
14 come his way and that would be helpful to the firm.

15 Q. And so "implicit" meaning you didn't use any words
16 directing or asking him to retrieve this list for you, correct?

17 A. That's correct.

18 Q. And that recognition by you of implicitly asking him, was
19 the first time that you came to that recognition after you sat
20 down with the prosecutors in December of 2018?

21 A. No. I think we had certainly encouraged him -- I certainly
22 encouraged him to remain in contact with his former colleagues
23 at the PCAOB and find out any information that he could gather.

24 Q. And were you -- when you actually used those words with
25 Mr. Sweet, you weren't telling him to retrieve confidential

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Whittle - cross

1 information from the PCAOB, right?

2 A. I wasn't -- I don't think I was very clear one way or the
3 other.

4 Q. You didn't use the words, provide me with the confidential
5 list, or words to that effect, with him, correct?

6 A. I did not.

7 Q. And you never shared with Mr. Middendorf your understanding
8 that you were implicitly asking Mr. Sweet to do certain things,
9 right?

10 A. I don't believe we had a conversation about implicit
11 requests.

12 Q. OK. So you have this conversation with Mr. Sweet and then
13 you call Mr. Middendorf, correct?

14 A. Yes.

15 Q. And he's traveling at the time, right?

16 A. I don't recall.

17 Q. You don't recall.

18 Do you recall if you called his cell or called him in
19 the office?

20 A. I don't remember.

21 Q. OK. But it was not face-to-face, it was a call, correct?

22 A. I believe it was a call, yes.

23 Q. And you told him about what Mr. Sweet told you, correct?

24 A. Yes.

25 Q. And as you said, you said this was preliminary, right?

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Whittle - cross

1 A. I did.

2 Q. That it was still in process, what was going to happen as
3 far as the list, correct?

4 A. Yes.

5 Q. That it could change, the list, correct?

6 A. Yes.

7 Q. And I think you testified that you told Mr. Middendorf it
8 was likely to change, right?

9 A. Yes.

10 Q. Would you agree with me that what you were expressing to
11 him was a prediction as to what the list might be in the future
12 for 2017?

13 A. I'm not sure I would call it a prediction. It was
14 information that had come through Mr. Sweet from the PCAOB, so
15 it was information that was relevant at that time, but it was
16 not the final list, for sure.

17 Q. And in that sense, it was no different than a prediction,
18 correct?

19 A. Again, I'm not sure that I would characterize it that way.
20 It was current information.

21 Q. Do you think it's unreasonable for Mr. Middendorf to
22 characterize it as a prediction?

23 MS. MERMELSTEIN: Objection, your Honor.

24 THE COURT: Sustained.

25 BY MR. BOXER:

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Whittle - cross

1 Q. There was uncertainty as to whether any of the names you
2 discussed would or would not be on the final list, correct?

3 A. There was uncertainty as to what the final list would be
4 and how much would be the same and how much would be different
5 than the preliminary list.

6 Q. Other than it was likely to change in some respect,
7 correct?

8 A. Correct.

9 Q. And you testified yesterday about four issuers, I believe.

10 The first was Citi, right?

11 A. Correct.

12 Q. And you said that Brian Sweet was already present on site
13 working on the Citi audit, correct?

14 A. That's correct.

15 Q. I think the expression is he was embedded with the
16 engagement team, is that right?

17 A. That sounds right.

18 Q. And is that another way of saying he's working closely on
19 the audit with the engagement team?

20 A. Yes.

21 Q. And that occurred before this conversation with Mr. Sweet,
22 right?

23 A. That's correct.

24 Q. And you said that there were IT people who in the prior
25 year had gone out and assisted the Citi engagement team before

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Whittle - cross

1 the audit opinion was issued, correct?

2 A. That's correct.

3 Q. And after this conversation with Mr. Sweet, those same IT
4 people were sent out to Citi to assist in the engagement again,
5 correct?

6 A. Yes.

7 Q. And that was going to happen whether Mr. Sweet had this
8 conversation with you or not, they were going to assist on the
9 audit, right?

10 A. That is not correct.

11 Q. It's -- is it fair to say it's one of the three biggest
12 engagements at KPMG?

13 A. It is one of our largest engagements, yes.

14 Q. Mr. Sweet spent literally thousands of hours or at least a
15 thousand hours working on the engagement?

16 A. I'm not sure how many hours he spent but he spent a fair
17 amount of time on the audit, yes.

18 Q. And your testimony is but for -- except for this
19 conversation with Mr. Sweet, you would not have had the same IT
20 people who looked at the audit last year come out and help with
21 the audit in 2017; is that your testimony?

22 A. That is correct.

23 Q. You wouldn't have done that?

24 A. I would not have done that.

25 Q. OK. And then you mentioned Charter. And that was one

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Whittle - cross

1 where I think you said you checked in with the engagement
2 partner?

3 A. I checked in with the second partner, the EQCR, on the
4 engagement.

5 Q. And you asked -- was it a him or a her?

6 A. Him.

7 Q. Him. What is his name?

8 A. Frank Blake.

9 Q. Frank Blake. And you asked Mr. Blake if he needed any
10 additional resources, right?

11 A. I did.

12 Q. And he said no, correct?

13 A. Initially he had said no.

14 Q. When you asked him that question, he said no?

15 A. Yes.

16 Q. And after he said no, you didn't take it upon yourself to
17 assign additional resources to the Charter audit, right?

18 A. I did not.

19 Q. And then he calls you back, he changes his mind, and he
20 says yes, right?

21 A. Correct.

22 Q. And it's after he says yes that then you assign an
23 additional person to the audit, right?

24 A. Correct.

25 Q. And then there was Valero, I believe?

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Whittle - cross

1 A. Yes.

2 Q. And that was the one where Ms. Holder had already been
3 contacted by the engagement team before the call from
4 Mr. Sweet, right?

5 A. Yes.

6 Q. And had already requested additional resources before the
7 call from Mr. Sweet, right?

8 A. It was around the same time.

9 Q. I believe you testified that it was before because you said
10 it was after that you authorized it. Am I misremembering that?

11 A. Could you repeat that again?

12 Q. I will.

13 I thought you testified yesterday that after you had
14 this conversation with Mr. Sweet was when you said yes to the
15 request for additional resources from either Ms. Holder or
16 somebody else from the Valero engagement team, is that right?

17 A. Yes, that's correct.

18 Q. So the request for additional resources came in from the
19 Valero team before your conversation with Mr. Sweet, right?

20 A. It was around the same date or time. I'm not sure exactly
21 how it lined up with the discussion with Mr. Sweet, but it was
22 approximately the same timing.

23 Q. OK. So let's do this again because I thought you had
24 answered it.

25 You made the authorization for the additional

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Whittle - cross

1 resources -- for the request for additional resources after you
2 spoke to Mr. Sweet, right?

3 A. Yes.

4 Q. But the request was pending at the time you spoke to
5 Mr. Sweet, right?

6 A. I don't recall the exact timing of when it came in, of
7 whether I spoke to him and the request came in immediately
8 thereafter and then I approved it. I certainly approved it
9 after the discussion with Mr. Sweet.

10 Q. OK. And it's not your recollection today that Ms. Holder
11 had already requested additional resources at the time that
12 call came in from Mr. Sweet?

13 A. Just I know it was approximately the same time. I don't
14 have a clear recollection of the dates that were involved.

15 Q. OK. And then the fourth one was Macy*s, I believe, right?

16 A. Yes.

17 Q. And this is the one where you had sent an additional
18 resource in the fall -- so that would be the fall of 2016 -- to
19 assist on the audit, right?

20 A. He was assisting with the engagement partner the audit and
21 other things in that business unit, yes.

22 Q. And was that Joe Lynch?

23 A. Yes.

24 Q. And who is Joe Lynch?

25 A. Joe Lynch is an IT inspector that worked in my internal

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Whittle - cross

1 Inspection Group.

2 Q. And what was his prior experience?

3 A. He had been in public accounting and then had spent a
4 number of years at the PCAOB.

5 Q. So he was another resource the firm hired to improve audit
6 quality, the firm hired from the PCAOB, correct?

7 A. That's correct.

8 Q. And so he was out at Macy*s in the fall. And a request had
9 already come in for him to come back out in January, right?

10 A. At some point during the audit. I'm not sure whether it
11 was January or another timeframe, but, yes, at some point.

12 Q. That request for Macy*s -- from the Macy*s -- withdrawn.

13 The Macy*s engagement partner, what was his name? Is
14 it Jon Atkinson?

15 A. Jon Atkinson.

16 Q. Correct?

17 A. That's correct.

18 Q. So Mr. Atkinson had requested for Mr. Lynch to come back
19 out and do more work on the audit before you received the
20 January call from Mr. Sweet, correct?

21 A. Correct.

22 Q. And then your testimony was you said OK and you received
23 that call from Mr. Sweet, right?

24 A. Correct.

25 Q. Is it your testimony that you were going to say no to

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Whittle - cross

1 Mr. Atkinson about having Mr. Lynch come back out to assist the
2 audit team up and until you received the call from Mr. Sweet?

3 A. I had not made a conclusion, but based on my broad -- I
4 used to get requests all the time for additional resources, and
5 in nearly all cases I would say no just because I had limited
6 resources and if I just started sending my people out to
7 everyone who asked for it, I would have no one left.

8 Q. I understand. But you had already sent Mr. Lynch out in
9 the fall, correct?

10 A. Yes.

11 Q. And as you mentioned, your boss, Mr. Middendorf, was a
12 reviewing partner on the Macy*s account, correct?

13 A. Correct.

14 Q. So sitting here today, isn't it fair to say that if
15 Mr. Atkinson asked for Mr. Lynch to come back out, you would
16 have said yes?

17 A. Not necessarily.

18 Q. Well, you said yesterday that you needed approval from
19 Mr. Middendorf to receive the list in 2015 because you didn't
20 want him to be mad at you. That was your testimony, right?

21 A. Yep.

22 Q. You said that, right?

23 A. Yes.

24 Q. And so when it comes to resources, you are telling us that
25 you would be OK if Mr. Middendorf was mad at you?

J2rdmid1

Whittle - cross

1 MS. MERMELSTEIN: Objection, your Honor.

2 THE COURT: Sustained.

3 BY MR. BOXER:

4 Q. So your testimony is that as far as Macy*s and Joe Lynch,
5 you don't know what you would have done in January if you
6 hadn't received a call from Mr. Sweet?

7 MS. MERMELSTEIN: Asked and answered, your Honor.

8 THE COURT: Overruled.

9 A. Can you repeat the question?

10 Q. Sure. So your testimony is that as far as Macy*s and Joe
11 Lynch, you did not know what you would have done in January if
12 you hadn't received a call from Mr. Sweet?

13 A. That's correct.

14 Q. And in all four of these instances -- Macy*s, Charter,
15 Valero and Citi -- resources were already in place on those
16 audits, correct?

17 A. They certainly all had engagement teams in place in the
18 local office to serve those clients.

19 That's what you were asking?

20 Q. That is what I was asking. Thank you.

21 And there was no rereview team assigned to any of
22 those audits, correct?

23 A. No.

24 Q. And as you mentioned, the preliminary list that you learned
25 of was likely to change, correct?

J2rdmid1

Whittle - cross

1 A. Correct.

2 Q. OK. So fast-forwarding just a few days to January 13th, if
3 we could show you what's marked as Government Exhibit 1076,
4 which I understand is in evidence.

5 And this is an email from Mr. Sweet to you, attaching
6 the bank screening risk assessment analysis, correct?

7 A. Correct.

8 Q. Mr. Middendorf is not cc'ed on the email, right?

9 A. That's correct.

10 Q. And this was an update to the screening analysis we looked
11 at yesterday that came over in November of 2016, right?

12 A. That's correct.

13 Q. And the one in November of 2016, which Mr. Middendorf --
14 withdrawn.

15 Mr. Middendorf was copied on the one in November of
16 2016, correct?

17 A. I don't -- I don't recall at the moment.

18 Q. Fair enough.

19 The one in November of 2016 reflected Mr. Sweet and
20 Ms. Holder's predictions for the 2017 inspections, correct?

21 A. That's correct.

22 Q. And in this version, in this January 13th, you had directed
23 Mr. Sweet and Ms. Holder to add Citi and I don't know if there
24 were -- I'll ask you if there were others, but at least to add
25 Citi to the screening analysis so that if Citi was chosen, it

J2rdmid1

Whittle - cross

1 wouldn't seem suspicious. Did I state that correctly?

2 A. I don't believe that Citi was added. I don't recall all
3 the names off the top of my head but I don't believe it was
4 Citi.

5 Q. Do you recall any of the names that were added?

6 A. I don't without comparing the two lists.

7 Q. But you instructed Mr. Sweet and Ms. Holder to add names to
8 the list that they had prepared in November, right?

9 A. I instructed Mr. Sweet to do so. I did not discuss it with
10 Ms. Holder.

11 Q. And you did that to avoid detection; that was the purpose,
12 correct?

13 A. If we -- yes.

14 Q. And that was an explicit instruction from you to Mr. Sweet,
15 correct?

16 A. Correct.

17 Q. There was nothing implicit about that instruction, right?

18 A. Correct.

19 Q. And the result of that explicit instruction is Government
20 Exhibit 1076 in front of you, correct?

21 A. Correct.

22 Q. And this news media analysis, I will call it, you didn't
23 Ford that along to Mr. Middendorf, correct?

24 A. I did not.

25 Q. I would like to now ask you a few questions about February

J2rdmid1

Whittle - cross

1 of 2017, starting with the call you received on
2 February 3rd from Mr. Sweet.

3 And I won't ask you to repeat your feeling about it or
4 what you said about it, but you agree with me that you were
5 shocked by the call?

6 A. Yes.

7 Q. And I think you testified that it was totally different
8 from anything else that you had received from Mr. Sweet in the
9 past, is that right?

10 A. That's correct.

11 Q. And it was different than the information about the four,
12 about Citi and Charter and Valero and Macy*s, that we just
13 discussed, correct?

14 A. Correct. It was the final approved list.

15 Q. And it was different than in 2015, when he sent over the
16 list of inspections, right?

17 A. That's correct.

18 Q. It is a yes or no question, Mr. Whittle. It's different
19 than what was sent over in May of 2015 from Mr. Sweet, correct?

20 A. They were both final lists.

21 Q. My question was what you received -- what you were told and
22 received from Mr. Sweet on February 3, 2017 was different, to
23 you, than what Mr. Sweet had sent over in May of 2015, right?

24 A. It was different.

25 Q. And you were totally shocked by what you had received,

J2rdmid1

Whittle - cross

1 correct?

2 A. I was.

3 Q. And that's because the audits were still open, right?

4 A. That's correct.

5 Q. In May of 2015 the audits were not open, right?

6 A. That's correct.

7 Q. In March of 2016, the audits were not open, correct?

8 A. Some might have been. I would have to go through the list.

9 There may have been one that was still ongoing, but for the
10 most part the audits had been completed and we were in the
11 documentation phase.

12 Q. The audits that you assigned a rereviewer to in March of
13 2016, all those audits were no longer open, correct?

14 A. I have to double-check on the timing of Bon-Ton.

15 Q. OK. But to the best of your knowledge, as you sit here
16 today, most, if not all, of the audits that you discussed in
17 March of 2016 were closed, correct?

18 A. Correct.

19 Q. And here for the first time, on February 3rd, Mr. Sweet is
20 presenting you with the list of inspections to occur later in
21 the year for audits that were -- all of which were open, right?

22 A. That would not be totally correct. There were -- it would
23 be correct for audits that had December or later year ends. If
24 the audits had earlier year ends, they may well have been
25 closed.

J2rdmid1

Whittle - cross

1 Q. The vast majority of the audits that Mr. Sweet informed you
2 of on February 3rd that were going to be inspected, the final
3 list, had open audits, correct?

4 A. That would be correct.

5 Q. And that's why you were totally shocked?

6 A. That's correct.

7 Q. And you understood -- withdrawn.

8 You informed Mr. Sweet, on February 3rd, that the two
9 of you needed to speak to Mr. Middendorf about it, correct?

10 A. Yes.

11 Q. And you told Mr. Sweet that nothing was to be done until he
12 and you spoke to Dave, correct?

13 A. That was what I took away from the conversation.

14 Q. I appreciate you don't recall your exact words, but your
15 understanding was that nothing was to be done and that that was
16 conveyed to Mr. Sweet until the two of you spoke to
17 Mr. Middendorf, correct?

18 A. He was involved in other -- in work with Citi and other
19 engagements so that work would continue. So that wasn't
20 stopping what he was already engaged with with different
21 engagement teams, including Citi, but that otherwise it would
22 have been a correct statement.

23 Q. So nothing out of the ordinary should have been done by
24 Mr. Sweet, that was your understanding, until the two of you
25 spoke with Mr. Middendorf, correct?

J2rdmid1

Whittle - cross

1 A. That was my understanding.

2 Q. Didn't Mr. Sweet say that he was going to reach out to,
3 say, for example, Diana Kunz during the call on February 3rd?

4 A. No.

5 Q. You did not authorize him on February 3rd to reach out to
6 Ms. Kunz, correct?

7 A. That's correct.

8 Q. And then on February 6th, you and Mr. Sweet have a call
9 with Mr. Middendorf, right?

10 A. Correct.

11 Q. You're each on your cell phone at the time of that call?
12 Is that a fair statement?

13 A. I was on my cell phone. I can't speak for the other two.

14 Q. You were not -- none of you were in the presence of any of
15 the others during the call, correct?

16 A. Correct.

17 Q. It was a dial-in and all three of you dialed into the call,
18 right?

19 A. That's correct.

20 Q. And at the conclusion of the call, Mr. Middendorf said not
21 to do anything or call anyone until he spoke to his boss,
22 Mr. Marcello, correct?

23 A. I don't recall specifically what he said, but my take away
24 was he was going to speak with Mr. Marcello before we finalized
25 plans as to how to use the list.

J2rdmid1

Whittle - cross

1 Q. And that was a clear understanding you had at the
2 conclusion of that call, correct?

3 A. Yes.

4 Q. Did you hear any mention of reaching out to Diana Kunz
5 during the February 6th call?

6 A. Mr. Sweet, in the course of the conversation as we went
7 through different engagements, would certainly offer which
8 partners he knew. I can't recall if Ms. Kunz's name came up,
9 but who he knew, how he knew them, what work he was doing with
10 them. So, that was part of that conversation.

11 Q. I think I asked a different question.

12 Do you recall Mr. Sweet informing the group that he
13 was going to reach out or had reached out to Ms. Kunz about the
14 fact that he had a complete list of the inspections?

15 A. He did not.

16 Q. And do you recall Mr. Sweet informing the group that he had
17 spoken with Paul Tupper prior to the call about the fact that
18 he had a complete list of the PCAOB inspections?

19 A. He did not.

20 Q. And then what happens next is February 8th, when
21 Mr. Middendorf comes into your office pretty excited, right?

22 A. Correct.

23 Q. And that was because Mr. Middendorf had learned, through a
24 chain of command, that Mr. Sweet had reached out to Ms. Kunz,
25 right?

J2rdmid1

Whittle - cross

1 A. Yes.

2 Q. And both you and Mr. Middendorf were shocked by that,
3 right?

4 A. Yes.

5 Q. And it was your understanding that no work or nothing was
6 to be done until Mr. Middendorf had spoken with Mr. Marcello
7 and a decision had been reached, correct?

8 A. Could you repeat the question?

9 Q. Withdraw the question.

10 The result of that meeting with Mr. Middendorf was
11 that you called Mr. Sweet to tell him to stop reaching out to
12 partners, correct?

13 A. Yes.

14 Q. And you were pretty angry when you had that call as well,
15 right?

16 A. I was upset about it, yes.

17 Q. And when you spoke to Mr. Sweet and told him what had
18 occurred, Mr. Sweet denied having reached out to Ms. Kunz,
19 correct?

20 A. He did start a denial about it but I didn't let him finish
21 getting it out before just telling him to stop, cease and
22 desist talking to partners.

23 Q. So his first reaction was to lie, correct?

24 A. It seemed he was heading in that direction.

25 Q. He never corrected the lie because you stopped him and said

J2rdmid1

Whittle - cross

1 cease and desist, right?

2 A. He did not return to it.

3 Q. OK. I think I want to change topics and just cover a few
4 remaining topics with you.

5 You mentioned yesterday that you attended PCAOB board
6 meetings; do you recall that?

7 A. Yes.

8 Q. And you were shown, if we could put it up, Government
9 Exhibit 1310.

10 I think you described this as a script, is that right?
11 It is a script?

12 A. Yes.

13 Q. And this one is for the September 29, 2016 KPMG meeting
14 with the board of the PCAOB, right?

15 A. Correct.

16 Q. And about how many board meetings do you think you
17 attended?

18 A. I know I attended at least two; it could have been three.
I know I've been to at least two, maybe more.

19 Q. And is it fair to say that they occur once, sometimes twice
20 a year?

21 A. I would say probably once every year to 18 months.

22 Q. And they are important meetings for KPMG, correct?

23 A. Correct.

24 Q. It's important for the firm to make a good impression at

J2rdmid1

Whittle - cross

1 the PCAOB board meetings, right?

2 A. Yes.

3 Q. And as a result, the firm wants to be well prepared for
4 those meetings, right?

5 A. Correct.

6 Q. And that's the purpose of Government Exhibit 1310, right?

7 A. Yes.

8 Q. It's a script that outlines answers to questions that might
9 be raised during the meeting, correct?

10 A. Yes, and it was in response to an agenda that the PCAOB
11 would provide to us in advance.

12 Q. I'm getting to that.

13 And it even assigned different people different
14 responsibilities for certain answers, right?

15 A. Correct.

16 Q. On the first page, Ms. Doughtie -- she is the Chairwoman of
17 the firm, correct?

18 A. Yes.

19 Q. And so she's going to make the opening remarks, according
20 to the script?

21 A. Correct.

22 Q. And you mentioned agenda. So does there come a time where
23 the PCAOB sends to the firm an agenda for the meeting?

24 A. Yes.

25 Q. And do you recall how long before the meeting itself that

J2rdmid1

Whittle - cross

1 agenda is sent to the firm?

2 A. I don't. I don't receive it directly. I usually get it
3 from someone else, but it could be days or a week. It is
4 relatively short time before the meeting.

5 Q. And in the preparation for the meeting, are there joint
6 meetings within the firm where the partners, you, Ms. Doughtie,
7 others, discuss how to prepare for the meeting?

8 A. Yes.

9 Q. And was Mr. Middendorf at some of those meetings?

10 A. Yes.

11 Q. And at those meetings, were you aware that -- withdrawn.

12 Did Mr. Middendorf inform the group, including
13 yourself, at those meetings that he had received a draft agenda
14 of the board meeting from one of the PCAOB board members?

15 MS. MERMELSTEIN: Objection to hearsay, your Honor.

16 MR. BOXER: It is all state of mind, your Honor.

17 MS. MERMELSTEIN: I don't follow that argument.

18 THE COURT: Overruled.

19 BY MR. BOXER:

20 Q. Do you want me to repeat the question?

21 A. Yes, please.

22 Q. Did Mr. Middendorf inform the group, including yourself, at
23 those meetings that he had received a draft agenda of the board
24 meeting from one of the PCAOB board members?

25 A. I do recall at least one time we did get a draft or

J2rdmid1

Whittle - cross

1 something through one of the board members, yes.

2 Q. And that draft came in before the official agenda was
3 received by the firm, correct?

4 A. I believe so.

5 Q. And that came in through Mr. Middendorf, is that right?

6 A. Either Mr. Middendorf or Mr. Marcello.

7 Q. And you were aware that two of the board members had
8 meetings with Mr. Marcello and Mr. Middendorf prior to receipt
9 of the draft agenda, correct?

10 MS. MERMELSTEIN: Objection to foundation, your Honor.
11 It is clearly calling for hearsay.

12 MR. BOXER: I will try it again.

13 THE COURT: OK.

14 BY MR. BOXER:

15 Q. At the time you became aware that the firm had received a
16 draft agenda, did you also learn how it was that the firm
17 received the draft agenda?

18 A. Yes.

19 Q. And did you learn that from Mr. Middendorf?

20 A. I believed --

21 MS. MERMELSTEIN: The same objection, your Honor, to
22 what was learned from something someone told him.

23 THE COURT: Sustained.

24 (Continued on next page)

J2rrmid2

Whittle - Cross

1 Q. Were you told by Mr. Middendorf how the firm had received
2 the draft agenda?

3 MS. MERMELSTEIN: Same objection.

4 THE COURT: Sustained.

5 Q. The draft agenda in the one instance you recall, did you
6 and others preparing for the meeting use the draft agenda?

7 A. I believe so, yes.

8 Q. In what way was it used?

9 A. Used as if it was the actual agenda, and we tried to
10 prepare remarks that would be responsive to it.

11 Q. After the draft agenda was received, did there come a time
12 when the official agenda was received?

13 A. Yes.

14 Q. Do you recall how long in between the time the draft agenda
15 was received and the official agenda was received?

16 A. I'm sorry, I do not.

17 Q. In using the draft agenda in the way you described, did
18 everybody in the group who was preparing use the draft agenda
19 in that way?

20 A. Yes.

21 Q. That group included Ms. Doughtie, correct?

22 A. Correct.

23 Q. It included Sven Holmes, correct?

24 A. Yes.

25 Q. Who is Sven Holmes?

J2rrmid2

Whittle - Cross

1 A. He is the vice chair of legal risk and regulatory.

2 Q. He was formerly a federal judge before he joined KPMG,
3 correct?

4 MS. MERMELSTEIN: Objection to foundation and hearsay
5 and relevance.

6 MR. BOXER: I think I can establish relevance.

7 THE COURT: Overruled. You can answer if you know.

8 A. Yes, my understanding is he has been a federal judge prior
9 to joining KPMG.

10 Q. When you were with Mr. Holmes, you referred to him as
11 "Judge Holmes," correct?

12 A. Sometimes.

13 Q. Generally speaking, when you heard people speaking to Mr.
14 Holmes, he was referred to as "Judge Holmes," correct?

15 A. He was referred to that way, yes.

16 Q. Others besides Ms. Doughtie and Mr. Holmes who were
17 preparing included Mr. Marcello, right?

18 A. Yes.

19 Q. Included Mr. Liddy?

20 A. If at the time he was a vice chair.

21 Q. The draft agenda that you received, that provided more time
22 for the firm to prepare for the PCAOB board meeting, correct?

23 MS. MERMELSTEIN: Objection, your Honor. May we
24 approach?

25 MR. BOXER: It seems to me a perfect valid question.

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Whittle - Cross

1 THE COURT: You may approach.

2 (Continued on next page)

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Whittle - Cross

1 (At the sidebar)

2 MS. MERMELSTEIN: Your Honor, I object to this whole
3 line of questioning, which is suggesting a number of
4 problematic things. First, it is a hundred percent being put
5 in for its truth that a board member provided a draft agenda,
6 and that is problematic because it is hearsay.

7 Number two, the notion that there is some relevance to
8 the fact that a member of the board disclosed a draft agenda is
9 somehow a suggestion that either the board member was violating
10 EC9 or that everyone had an understanding that it was okay to
11 get information from the PCAOB and that there was some
12 similarity between a board member providing a draft agenda and
13 confidential PCAOB information about inspections being stolen
14 and secretly provided is I think factually unsupported and
15 legally irrelevant.

16 To the extent that it is evidence of some other person
17 acting badly, it is relevant. And to the extent that this is
18 evidence that this was not wrong because someone else did it in
19 a different context, that too is not a proper argument.

20 MR. BOXER: None of those are reasons for offering it.
21 As Ms. Mermelstein knows next week we will be calling one of
22 the former board members, Jay Hanson, who will testify
23 consistent with what Mr. Whittle just described. So I think
24 the relevance of establishing it will be corroborated.

25 This whole case is about Mr. Middendorf's intent,

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Whittle - Cross

1 whether he had good faith in using the information that he did
2 in 2016. In fact, we have heard testimony from Ms. Mullen, and
3 maybe Mr. Marino, that Mr. Marcello's response in 2017 to the
4 list was maybe the PCAOB wanted us to have it, maybe the other
5 firms have it.

6 Whether he thought what he received was confidential
7 and he was using it in a fraudulent way in his mind is what the
8 case is about. This evidence shows, as other evidence did,
9 that there is a lot of free flow of information from the PCAOB
10 to the firm, including at the highest levels. So, when a
11 preliminary list or a prediction comes across in 2016 and he
12 uses it, he's using it in good faith, he doesn't think he is
13 committing a fraud. In 2017 he ultimately doesn't use it.

14 In fact, there is evidence in the record from Mr.
15 Marcello that Mr. Marcello thought twice about it because he
16 thought maybe they want us to have it, they've given us things
17 in the past. It explains his behavior not just contextually
18 but his intent.

19 It is not being offered to say that two wrongs make a
20 right. We have no problem with an instruction to that effect.
21 But it is relevant to what Mr. Middendorf intended in real
22 time.

23 THE COURT: Isn't it being offered for the truth in
24 that it is being offered for the fact that a draft agenda, for
25 example, was provided to KPMG?

J2rrmid2

Whittle - Cross

1 MR. BOXER: I'm offering it to establish the fact that
2 it was provided as relevant to Mr. Middendorf's state of mind.
3 I appreciate Mr. Whittle is not on trial, but he is a charged
4 co-conspirator. So I think it is relevant to the state of mind
5 of the conspiracy. It did take me a question or two to move
6 from Mr. Whittle's knowledge to Mr. Middendorf's knowledge. I
7 think it is relevant to the state of mind of the conspiracy. I
8 appreciate Mr. Whittle is not charged, at least at this point,
9 but it took a question or two to get into Mr. Middendorf's head
10 and his state of mind.

11 THE COURT: Are you suggesting that this draft agenda
12 was confidential information?

13 MR. BOXER: Absolutely. In fact, the board didn't
14 give the firm a lot of time with the agenda precisely for the
15 same reason it didn't give the firm a lot of time with the
16 inspection list. It wanted it to not overprepare for the
17 meeting. Here is an instance we will establish in our case
18 that one of the board members thought that was unfair and he
19 revealed an agenda and information in a private meeting with
20 Mr. Middendorf and Mr. Marcello before every single board
21 meeting.

22 MR. WEDDLE: I think your Honor's question points out
23 the objection that I have repeated a number of times in the
24 case, which is nobody knows this is confidential information.
25 The indictment in paragraph 13 says, "Unless authorized by the

J2rrmid2

Whittle - Cross

1 board," and this is quoting EC9, "Unless authorized by the
2 board, no board member or staff shall disseminate or otherwise
3 disclose any information obtained in the course or scope of his
4 or her employment and which has not been released, announced,
5 or otherwise made available publicly."

6 THE COURT: I understand this goes to the breadth
7 argument.

8 MR. WEDDLE: The prosecutor just said there is no
9 similarity, this is allegedly or ostensibly or by everybody's
10 understanding a draft agenda disclosed by a board member that
11 is totally different. The rule by its plain terms doesn't
12 permit board members to do anything different from what staff
13 members can do. That's the issue.

14 The fact that a bunch of people are sitting around
15 understanding, whether or not it is true, understanding that
16 this is a draft agenda that was disclosed by a board member,
17 not a board-approved disclosure, and they are working with it
18 is highly probative of everybody's state of mind. And it
19 highlights the defect in this prosecution, which is the rule in
20 a criminal case cannot be whatever the prosecutors decide it
21 may be in a particular circumstance.

22 MS. MERMELSTEIN: I think we have gotten far afield
23 from the objection to this testimony, which is hearsay.
24 Leaving aside for a moment whether or not Mr. Hanson's
25 testimony on this may be proper, there is a motion to preclude

J2rrmid2

Whittle - Cross

1 most of his testimony pending before your Honor. He is not on
2 the stand. The fact that he will be called has nothing to say
3 about what is hearsay with respect to this witness.

4 I think Mr. Boxer has just conceded that the statement
5 made to this witness by Mr. Middendorf that he received it from
6 a board member has been offered to prove that he received it
7 from a board member. It cannot show the effect on Mr.
8 Middendorf. He is the declarant. It is not being told to him
9 to show he understood its truth. He is the one saying it.

10 This is totally to establish this is true. This is
11 the definition of hearsay. It is not appropriate. If another
12 witness has a nonhearsay basis to offer testimony on this topic
13 that is relevant, which I don't think it is, we can have that
14 fight later. That is an issue for another day.

15 This is hearsay with respect to this witness. We
16 renew our objection to this line of questioning and move to
17 strike the questions that have elicited hearsay.

18 MR. BOXER: I think it was just stated in the reverse.
19 It was Mr. Middendorf saying it to Whittle.

20 MS. MERMELSTEIN: Right, exactly.

21 MR. BOXER: I'll withdraw the last question and we can
22 move on.

23 I would like to address their application regarding
24 Mr. Hanson's testimony briefly. I meant to do that.

25 THE COURT: I assume at some point we will talk about

J2rrmid2

Whittle - Cross

1 that. I take the point. I am going to give some leeway for
2 the state of mind. I think the backdrop of the back-and-forth
3 communications with PCAOB board members or low-level staff is
4 important context for the defendant's state of mind. I accept
5 that. But I think this particular example, Middendorf said I
6 received this, is actually squarely within the hearsay
7 exception. I am going to sustain the objection as to that for
8 that reason.

9 MR. BOXER: Understood. I'll move on.

10 MS. MERMELSTEIN: And strike the testimony that has
11 been improperly offered, your Honor?

12 MR. BOXER: I don't know what that means, improperly
13 offered.

14 MS. MERMELSTEIN: My initial to objection to this
15 being hearsay was correct, so the testimony that followed that
16 is improper and should be stricken.

17 MR. BOXER: He testified about his own knowledge. He
18 used the draft.

19 THE COURT: He didn't say it came from defendant.

20 MS. MERMELSTEIN: We can check the transcript, but
21 I'll fairly confident he was asked, did Mr. Middendorf tell you
22 that, and he agreed to that.

23 MR. WEDDLE: The objection was sustained.

24 THE COURT: I think he said, I came to know it.

25 MS. MERMELSTEIN: I'm happy to look back for it,

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Whittle - Cross

1 Judge.

2 (Continued on next page)

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Whittle - Cross

1 (In open court)

2 BY MR. BOXER:

3 Q. New topic, Mr. Whittle. You were the head of inspections
4 at KPMG, correct?

5 A. Yes.

6 Q. I know it had a longer title about quality measurement, but
7 essentially you were the head of inspections, right?

8 A. Correct.

9 Q. You never attended a meeting with the SEC in the past, is
10 that correct?

11 A. That's correct.

12 Q. You did not attend a meeting at any time with Wes Bricker,
13 correct?

14 A. I never attended a meeting with Mr. Bricker.

15 Q. And you never attended a meeting with Mary Jo White,
16 correct?

17 A. Correct.

18 Q. You were never asked to provide an update on KPMG's
19 performance in PCAOB inspections in a meeting with the SEC,
20 right?

21 A. Correct.

22 Q. You were shown yesterday Government Exhibit 925, if we can
23 show that, an article about a speech Ms. White gave, correct?

24 A. That's correct.

25 Q. It's December 2015, right?

J2rrmid2

Whittle - Cross

1 A. Correct.

2 Q. It speaks to ignoring red flags. If we go to the middle of
3 the first page, where it starts with "Reporting and auditing,
4 missing or ignoring red flags," correct?

5 A. Yes.

6 Q. Those red flags, isn't it true, concerned falsifying
7 entries in financial statements, correct?

8 A. Could you repeat the question.

9 Q. The red flags that Ms. White is speaking about concerned
10 falsifying information in financial statements by people who
11 worked at issuers?

12 A. I'm not sure specifically the reference that's here. I'm
13 not sure I know the answer.

14 Q. That's fine. Is it also fair to say that the reference
15 here does not refer to results on PCAOB inspection reports,
16 correct?

17 A. It does not appear to be about inspection results.

18 Q. If we can turn to the third page of Exhibit 925 and point
19 you to the first full paragraph. I ask you to read the first
20 sentence.

21 A. "But, as you know, debate persists about" --

22 MS. MERMELSTEIN: Your Honor, I apologize. This was
23 not offered for its truth, so I'm concerned that it is about to
24 be used in a manner that is for its truth.

25 MR. BOXER: I am going to ask a question about his

J2rrmid2

Whittle - Cross

1 state of mind with respect to this sentence, your Honor.

2 MS. MERMELSTEIN: I'm so sorry, your Honor. May we
3 approach?

4 MR. BOXER: It's in evidence.

5 MS. MERMELSTEIN: It has proper and improper purposes.
6 This is the exact same blaming-the-victim argument we have had
7 many times now, and this is not proper.

8 MR. BOXER: I object to that comment.

9 MR. WEDDLE: Objection to the comment, your Honor.

10 THE COURT: Sustained.

11 Q. May I try it this way and see if it doesn't draw objection.
12 You don't know whether any of the statements in Government
13 Exhibit 925 are true or not true, right?

14 A. I do not.

15 Q. My question is whether any of the statements in 925
16 affected your view of the inspection process, whether it went
17 to your state of mind. With that predicate, my question is,
18 the first sentence that is highlighted, whether you were aware
19 of that, what is reflected in that statement at this time in
20 2015.

21 MS. MERMELSTEIN: Objection to the relevance of this,
22 your Honor.

23 THE COURT: Overruled.

24 Q. You can read it to yourself, Mr. Whittle.

25 A. Your question again, please.

J2rrmid2

Whittle - Cross

1 Q. You were aware at this time in 2015 that there was debate
2 within the accounting profession as to whether the PCAOB was
3 requiring too many or even too few rules on auditors?

4 MS. MERMELSTEIN: Objection.

5 THE COURT: Overruled.

6 A. There was debate. There was debate broadly about that
7 topic, yes.

8 Q. Just one example of that would be the application of what
9 is called AS 5, correct?

10 A. It could cover many different things, sure.

11 Q. The one I reference had to do with auditing and testing for
12 internal controls, correct?

13 A. Right.

14 Q. There was debate within the industry as to whether there
15 was too much requirement from the PCAOB or just right or not
16 enough, right?

17 A. Correct.

18 MR. BOXER: You can take that down.

19 Q. You touched on this in your direct testimony. It sounded
20 to me like you assumed your role pretty close in time to when
21 Mr. Middendorf assumed his role as national managing partner.
22 Is that fair to say?

23 A. I assumed my final role, I assumed that in June of 2014.

24 Q. That was about the same time that Mr. Middendorf became
25 national managing partner of what is referred to as DPP,

J2rrmid2

Whittle - Cross

1 correct?

2 A. Approximately the same time. I don't recall when he took
3 that position.

4 Q. It's fair to say that Mr. Middendorf supported a lot of
5 initiatives to improper audit quality at KPMG, correct?

6 A. Correct.

7 Q. One I think you mentioned, his predecessor did not attend
8 the monthly PCAOB meetings but Mr. Middendorf began to and
9 attended all of those meetings, correct?

10 A. That's correct.

11 Q. That was designed to address the PCAOB's criticism in its
12 part 2 comment from the year before that there was a problem
13 with the tone at the top, right?

14 A. In part, yes.

15 Q. Mr. Middendorf was near the top, so he wanted to be present
16 at those meetings and be engaged in those meetings with the
17 PCAOB, correct?

18 A. It was certainly part of our response to the criticism.

19 Q. Mr. Middendorf's bosses, first Jim Liddy and then Scott
20 Marcello, they also started attending those monthly PCAOB
21 meetings, right?

22 A. Yes, they did.

23 Q. Mr. Middendorf and you as well were responsive to requests
24 from the PCAOB for improvements in audit quality, correct?

25 A. Everyone was. Everyone became very responsive.

J2rrmid2

Whittle - Cross

1 Q. Programs were added, right, within KPMG?

2 A. Yes, they were.

3 Q. People were added, right?

4 A. Yes.

5 Q. Money was spent, correct?

6 A. Correct.

7 Q. By the way, when money is spent in DPP, that's not expenses
8 that could be charged to any particular client of the firm,
9 right?

10 A. Correct.

11 Q. It just can't be recouped like the hours somebody works on
12 an audit that gets billed to a client, right?

13 A. That's correct.

14 Q. It just takes away from the profitability of the firm, the
15 more you spend on DPP, correct?

16 A. Yes.

17 THE COURT: Could you remind the jury what DPP is.

18 THE WITNESS: DPP stands for the department of
19 professional practice. There are several different names we
20 use to describe the national office.

21 Q. The firm initiated an audit quality bonus program, correct?

22 A. Yes.

23 Q. That was to reward the staff people and senior managers on
24 an engagement team if their audit went through inspection
25 without a comment, correct?

J2rrmid2

Whittle - Cross

1 A. An outside, external audit -- external inspection, right.

2 Q. That was something that the PCAOB wanted to see the firm
3 do, correct?

4 A. They never specifically opined on any particular activity
5 that we did.

6 Q. Understood. The situation before the bonus program was
7 that someone on an engagement team can suffer a penalty if they
8 were to have one of their audits fail an outside inspection,
9 right?

10 A. Yes.

11 Q. The PCAOB in those monthly meetings raised the issue of why
12 the firm wasn't rewarding a bonus and incentivizing its
13 employees for an external inspection that was passed, right?

14 A. They did raise a question as to why there was only
15 penalties.

16 Q. After they raised the question, the firm initiated the
17 bonus program you just spoke about, correct?

18 A. Yes.

19 Q. Then there were monitoring programs, right?

20 A. I'm sorry. Which ones?

21 Q. Monitoring programs that were instituted, right?

22 A. Yes.

23 Q. There was something called accelerating audited execution
24 that was instituted, correct?

25 A. Yes.

J2rrmid2

Whittle - Cross

1 Q. Could you explain what accelerating audit execution is.

2 A. It was an attempt to get teams to start their planning and
3 their interim work earlier in the calendar year with the hopes
4 that if you planned early and better, you would have a better
5 outcome on the audit.

6 Q. You approved the training within your group I think you
7 testified yesterday, correct?

8 A. Yes.

9 Q. You mentioned, these may not be your exact words, a more
10 robust root cause analysis program, is that right?

11 A. Correct.

12 Q. Could you explain for the jury what root cause analysis is.

13 A. It's a way to look at a problem and not just sort of fix
14 the symptom but see if there is some underlying cause for why
15 we would continue to have an audit deficiency. We implemented
16 a methodology to try to drill down into determining what the
17 underlying cause is and try to fix that with the hope that it
18 would remediate the deficiency.

19 Q. You also added more internal inspectors to your group,
20 correct?

21 A. Yes.

22 Q. You were seeing results from all of these efforts, right?

23 A. Correct.

24 Q. Audit quality was improving, correct?

25 A. Yes.

J2rrmid2

Whittle - Cross

1 Q. You were asked some questions yesterday about a 2016
2 inspection and the results from that inspection. Do you recall
3 being asked those questions?

4 A. Yes.

5 Q. I'm not going to repeat those questions. Let me start with
6 a few that I think were addressed. If I remember correctly,
7 there were 11 financial institutions that were rereviewed in
8 2016, in March and early April 2016. Is that consistent with
9 your recollection?

10 A. Approximately.

11 Q. I think you testified that in that 2016 report, none of the
12 banks or institutions that were rereviewed received a comment
13 for ALL. Do I have that right?

14 A. No.

15 Q. Please correct me.

16 A. None of them received a comment on the allowance for loan
17 loss area where we had had historical deficiencies.

18 Q. You testified that you would have expected to see
19 improvement but you were surprised that that was the case for
20 all of them where there were historical deficiencies, correct?

21 A. Correct.

22 Q. In the actual inspection, there were 10 financial
23 institutions -- excuse me -- 11 financial institutions that
24 were actually inspected, is that right?

25 A. Approximately.

J2rrmid2

Whittle - Cross

1 Q. Not all of those were subject to the re-review, correct?

2 A. That's correct.

3 Q. I believe only 6 were subject to the re-review, is that
4 right?

5 A. I don't recall specifically.

6 Q. Is it correct that 4 of 11 institutions that were inspected
7 by the PCAOB were not rereviewed?

8 A. I don't recall the specific numbers as to how many. I know
9 there were some that did not go through re-review.

10 Q. Assuming there were 4 that did not go through re-review,
11 you agree with me that the fact that those 4 did not receive
12 any comments had nothing to do with the re-review, correct?

13 A. I would agree with that, yes.

14 Q. The programs with respect to those 4 that you championed
15 and Mr. Middendorf championed, those were the things that led
16 to no comments, correct?

17 A. Certainly in the execution by the engagement team, it was
18 paramount.

19 Q. There were also some of the institutions that were
20 rereviewed that did receive comments, right?

21 A. In areas not included within the -- outside of the
22 historical allowance for loan loss areas, there were some
23 institutions that got comments.

24 Q. In fact, there were 3 that received comments, initial
25 comments, correct?

J2rrmid2

Whittle - Cross

1 A. I know there were some. I don't have recall on how many.

2 Q. Do you recall that one that received an initial comment
3 through debate with KPMG ultimately did not appear in part 1?

4 A. I don't recall. I'm sorry.

5 Q. Do you recall that of the institutions re-reviewed, 2 of
6 them had comments that appeared in part 1?

7 A. There were some that appeared in part 1. I know one was in
8 a new area of the allowance for loan loss. I don't recall
9 again how many specifically there were.

10 Q. When you say it was in a new area, it's a subset of the
11 topic of allowance for loan loss where it received a comment?

12 A. Yes.

13 Q. The re-reviewers, like Mr. Sweet, Ms. Holder, they went in
14 and looked at the workpapers concerning allowance for loan
15 loss, right?

16 A. Yes.

17 Q. And 2 still got a comment in part 1, correct?

18 A. I know there was at least 1. I don't recall if there were
19 2.

20 Q. The re-reviews, those all occurred after the substantive
21 audit work was completed, right?

22 A. After the release of the audit report, yes.

23 Q. As you said, the standards were followed during the
24 re-reviews, best you understood, correct?

25 A. Best I understood, yes.

J2rrmid2

Whittle - Cross

1 Q. It was the intent, your intent, that the standards be
2 followed during the re-review, correct?

3 A. Yes.

4 Q. If an institution that was re-reviewed and did not receive
5 a comment, that would be based on the substantive work that was
6 done before the opinion was released, correct?

7 A. Could you repeat that?

8 Q. If an institution that was re-reviewed and did not receive
9 a comment, the fact that it didn't receive a comment would be
10 based on the substantive audit work that was done by the team
11 before the re-review even occurred, before the opinion was
12 issued, isn't that correct?

13 A. I'm not sure that's entirely correct.

14 Q. As we spoke yesterday, the PCAOB says they don't give
15 comments for documentation issues, right?

16 A. They don't. However, the documentation is a critical part
17 of the workpapers. We have found that if the documentation is
18 good, it leads to avoiding questions and therefore follow-on to
19 comments. So it's a critical part of the process.

20 Q. I understand. I'm not disputing that.

21 MS. MERMELSTEIN: Objection to the commentary.

22 Q. My question is: The audits that were re-reviewed and did
23 not receive comments, the inspection was based on the
24 substantive audit work that was done and completed before the
25 re-review started, true?

J2rrmid2

Whittle - Cross

1 MS. MERMELSTEIN: Objection: asked and answered.

2 THE COURT: Overruled.

3 A. The inspection is done on the completed set of workpapers.

4 Q. That occurred before the re-review started, right?

5 A. No. The completed workpapers include the work done during
6 the rereview period.

7 MR. BOXER: I don't think I have had my question
8 answered, your Honor, so I'm going to try one more time.

9 THE COURT: Okay.

10 Q. The audits that were re-reviewed did not receive a comment.
11 The substantive work on those audits was completed before the
12 re-review began? Yes or no.

13 MS. KRAMER: The witness has answered this question
14 three times.

15 THE COURT: Overruled.

16 A. Could you repeat the question. I'm sorry.

17 Q. The audits that were re-reviewed that did not receive a
18 comment, those audits, the substantive work on those audits was
19 completed before the re-review began? Yes or no.

20 A. I have trouble --

21 Q. I'm asking about the substantive audit work. The
22 substantive audit work on the audits that did not receive a
23 comment was completed before the re-review began, correct?

24 A. When you say substantive audit work, that is as opposed to
25 control work?

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Whittle - Cross

1 Q. As opposed to documentation.

2 A. The audit procedure in a line audit procedure should have
3 been completed at the date of the release of the audit report.

4 Q. That date was before the re-review began, correct?

5 A. Correct.

6 Q. I want to conclude with a few questions, Mr. Whittle,
7 asking you to identify a few photographs. If we could show you
8 Exhibit M291. Do you recognize that picture, who that is?

9 A. Yes, I do.

10 Q. Who is that?

11 A. That's the chairman of the firm, Lynn Doughtie.

12 MR. BOXER: We offer 291.

13 MS. MERMELSTEIN: No objection.

14 THE COURT: M291 received.

15 (Defendant's Exhibit M291 received in evidence)

16 Q. Next M292. Do you recognize who that's a picture of?

17 A. Yes.

18 Q. Who is that?

19 A. Sven Holmes.

20 MR. BOXER: We offer M292, your Honor.

21 MS. MERMELSTEIN: No objection.

22 THE COURT: M292 received.

23 (Defendant's Exhibit M292 received in evidence)

24 Q. M293, do you recognize that photograph?

25 A. Yes.

J2rrmid2

Whittle - Cross

1 Q. Who is that?

2 A. Jim Liddy.

3 MR. BOXER: We offer M293, your Honor.

4 MS. MERMELSTEIN: No objection.

5 THE COURT: Received.

6 (Defendant's Exhibit M293 received in evidence)

7 Q. Showing you M294, do you recognize that picture?

8 A. I don't recognize the picture.

9 Q. Do you recognize who that is?

10 A. I do.

11 Q. Who is that?

12 A. Scott Marcello.

13 MR. BOXER: We offer M294, your Honor.

14 MS. MERMELSTEIN: No objection.

15 THE COURT: Received.

16 (Defendant's Exhibit M294 received in evidence)

17 Q. M295, do you recognize who is depicted in M295?

18 A. Yes.

19 Q. Who is that?

20 A. Laurie Mullen.

21 MR. BOXER: We offer M295, your Honor.

22 THE COURT: Received.

23 (Defendant's Exhibit M295 received in evidence)

24 Q. Lastly, showing you M296, do you recognize the person
25 depicted in M296?

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Whittle - Cross

1 A. Yes.

2 Q. Who is that?

3 A. John Goodheart.

4 MR. BOXER: We offer M296, your Honor.

5 THE COURT: Received.

6 (Defendant's Exhibit M296 received in evidence)

7 MR. BOXER: No further questions.

8 THE COURT: Would this be a good time for a quick
9 break? Let's take a 10-minute break. It's 11:05. We will
10 start back at 11:15.

11 (Continued on next page)

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Whittle - Cross

1 (Jury not present, witness not present)

2 MS. KRAMER: Your Honor, there was a point where Mr.
3 Boxer said, "I understand. I'm not disputing that," Ms.
4 Mermelstein said "Objection to the commentary." I heard your
5 Honor say "sustained" but I didn't see it on the transcript.
6 If you sustained that objection, I just wanted the transcript
7 to be clear.

8 MR. BOXER: If you didn't sustain it, I have no
9 objection. It was an inappropriate statement.

10 THE COURT: I did say "sustained," not loudly enough.

11 MS. KRAMER: Thank you, your Honor.

12 MR. WEDDLE: Your Honor, on that same note, I objected
13 a number of times to the commentary by the prosecutor. We have
14 been very careful in making nonspeaking objections and not
15 injecting commentary to the trial. For the prosecutor to say
16 he's blaming the victim is completely inappropriate, and I
17 object it.

18 MR. BOXER: I agree and ask that it be stricken.

19 THE COURT: I sustain the objection.

20 MR. WEDDLE: Thank you, your Honor.

21 THE COURT: That may have been my fault because the
22 prosecutor asked for a sidebar and I wasn't having it. In any
23 event, I think everyone is on notice that those sorts of
24 comments should be avoided.

25 We'll be in recess for ten minutes.

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Whittle - Cross

1 (Recess)

2 THE COURT: One thing I wanted to mention, and this is
3 a scheduling matter. Ms. LaStrange, who is Juror No. 5, had
4 told us in the first week, maybe even in jury selection, that
5 on Thursday the 28th she had to leave at 4:00 p.m. because of a
6 commitment she had. I may have forgotten to mention this, I
7 probably did. We had sort of generally assured her if there is
8 a particular day where we have to stop one hour early because
9 of a witness's prior commitment, that wouldn't be a problem. I
10 want to let everyone know that I believe we'll have to break at
11 4 o'clock tomorrow.

12 MR. BOXER: As a reminder, your Honor, our defense
13 witness Mr. Blake is only available tomorrow.

14 THE COURT: So we'll either have to take him out of
15 order or --

16 MR. BOXER: Maybe he will come in order. I just
17 wanted to alert the Court.

18 MS. KRAMER: Your Honor, one point before Mr. Whittle
19 gets back on the stand. We expect our next witness is going to
20 be Zachary Greenwood and we will get to him before lunch. We
21 put in our letter that we intended to not offer him as an
22 expert. But we do think he is qualified as an expert, and
23 after discussion with defense counsel we are going to elicit
24 his qualifications. I still think we are not going to offer in
25 front of the jury that he is an expert, consistent with our

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Whittle - Cross

1 position on what should be done with Mr. Atkins, but I believe
2 we are going to elicit his qualifications, and I believe his
3 nature will be a little more in the nature of expert testimony.

4 THE COURT: All right.

5 MS. KRAMER: Your Honor, following up on my this
6 morning, I conferred with counsel for defendant Wada, who no
7 longer intends to question Mr. Rubino on anything other than
8 the limited system he is going to give on direct about
9 retrieving the notes. I never heard from counsel for
10 Middendorf, so my understanding is that defense counsel is not
11 going to try to cross Rubino beyond his limited testimony about
12 the notepads. I think that issue is off the table.

13 Then we expect to call Brian Sweet tomorrow about the
14 notes, so we will need a ruling from your Honor on that.

15 THE COURT: Let me ask one thing about the notes.
16 Given what Ms. Lester was arguing about how it is a rule of
17 completeness type argument, to the extent that some of the
18 other entries outside the government's proposed version might
19 be sort of first-person type notes, I would think to some
20 extent it supports an argument that some of these notes were
21 not necessarily statements of someone else but were his own
22 thoughts. I can't necessarily tell just by looking what is and
23 what isn't.

24 You gave one example. There is one example in the
25 government's part, I think. I think they argued that that is

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Whittle - Cross

1 enough. But I think if there are other examples, it could be
2 admitted for that purpose because it shows the context and
3 arguably supports an argument that it is misleading to limit it
4 in a way that doesn't include the possibility of an argument
5 that it is something else.

6 However, the cross-examination will have to be limited
7 in that situation where I allow the larger part in so as not to
8 allow it to be simply a backdoor way of getting in statements
9 of Mr. Middendorf that are good conduct statements, because
10 that would be improper hearsay if used for that purpose.

11 MS. KRAMER: Your Honor, the only ones that fall into
12 that bucket are the paragraphs that the government wants to
13 offer. Paragraph 1 on page 2 and paragraph 3 on page 2 was the
14 example Ms. Lester gave, the last line being "Dave, Tom, Steve,
15 very good." What Ms. Lester said this morning is that is a
16 reference to Dave Middendorf, so it wouldn't be something that
17 he himself had said. So just paragraphs 1 and 3 on page 2.
18 And then the other one we want to cover was 5, PCAOB contacts,
19 for the prior consistent statement.

20 Page 1 was not at all the notes that Mr. Sweet took
21 during his meeting with Middendorf, which is not in dispute.
22 That's been consistent in the 3500 material. So it is just
23 page 2, paragraphs 1, 3, and 5, and we would not object to that
24 coming in for the reasons your Honor stated.

25 THE COURT: What is it that the defendants want? Do

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Whittle - Cross

1 you want something more from page 1?

2 MS. LESTER: Yes, your Honor. We would like all of
3 page 1 and all of page 2 with the exception of the portion to
4 the right of the line and the notation above the vertical line
5 that says 4/1 KVN.

6 THE COURT: Back up a second.

7 MS. LESTER: The entirety of page.

8 THE COURT: All of page 1.

9 MS. LESTER: Yes and the entirety of the page 2 with
10 the exception to the right of the vertical line and the circle
11 above that says "4/1 KVN" and some illegible notation right
12 above it.

13 THE COURT: Let's start with page 1. What can you
14 represent to me about page 1?

15 MS. LESTER: Your Honor, the reason we need the entire
16 document is that it helps put in context the second page. The
17 way that it does that is this. Mr. Sweet has described in his
18 3500 material that these two pages represent notes that were
19 made in connection with the meeting/call with Mr. Middendorf
20 and Mr. Liddy.

21 I believe, although the prosecutors will correct me if
22 I'm wrong, that the top part above the line, the horizontal
23 line, is the portion that he wrote to himself as notes to
24 prepare for that. Then the portion below the horizontal line
25 are the parts that recount the discussion with Mr. Liddy. I

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Whittle - Cross

1 believe he would say that those are Mr. Liddy's comments to
2 him.

3 The second page, our view is that arguably these may
4 be similar to the top part of the first page and that they are
5 not preparation notes but they are notes that Mr. Sweet took of
6 what he was saying or what the substance of what he intended to
7 say during the meeting with Mr. Middendorf. We believe that
8 the entirety has to come in so that we can properly place in
9 context the portions that on the second page clearly imply to
10 us statements by Mr. Sweet, not by Mr. Middendorf.

11 THE COURT: I understand the argument.

12 MS. KRAMER: Should I respond, your Honor?

13 THE COURT: No, you don't need to. Can we go forward
14 now with the testimony?

15 MS. KRAMER: Yes. Can we get a ruling from your Honor
16 on this by the end of the today so I can prepare for tomorrow?

17 THE COURT: Yes.

18 MS. KRAMER: Thank you, your Honor.

19 MR. WEDDLE: Your Honor, while the witness is coming
20 in, I wanted to alert your Honor that to try to speed things
21 up, I'm going to try to do two packets of emails with the
22 witness. I haven't had any time to prepare with him. I have
23 put them at the witness stand. We'll see if he can answer them
24 in one fell swoop. I'll hand a copy to your Honor, and I have
25 shown them to the prosecutors.

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Whittle - Cross

1 THE COURT: Okay.

2 (Continued on next page)

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Whittle - Cross

1 (Jury present, witness resumed)

2 THE COURT: Welcome back, ladies and gentlemen. We
3 will now have the cross-examination of the witness by counsel
4 for Mr. Wada, Mr. Weddle.

5 CROSS-EXAMINATION

6 BY MR. WEDDLE:

7 Q. Good morning, sir. My name is Justin Weddle. I represent
8 Jeffrey Wada in this case. In your direct testimony you didn't
9 mention Mr. Jeffrey Wada at all, right?

10 A. That's correct.

11 MR. WEDDLE: Jeff, can you stand up.

12 Q. Have you ever had any contact with Mr. Wada, to your
13 recollection?

14 A. No.

15 Q. When you talked in your direct testimony about recruiting
16 Brian Sweet, you said it was part of an effort to recruit more
17 broadly from the PCAOB, right?

18 A. That's correct.

19 Q. Let me show you some photos as well.

20 MR. WEDDLE: Can we put UP just for the witness and
21 Court and counsel Defense Exhibit 1639.

22 Q. Do you recognize that to be a photograph of David Knibbs?

23 A. I do not.

24 Q. Can we put up 1640. Do you recognize that to be a
25 photograph of Jeffrey Lutz?

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Whittle - Cross

1 A. Yes.

2 MR. WEDDLE: We offer Defense Exhibit 1640.

3 THE COURT: 1640 is received.

4 (Defendant's Exhibit 1640 received in evidence)

5 Q. Let's put up defense Exhibit 1641. Do you recognize that
6 to be a photograph of Jeffrey Watkins?

7 A. I do not.

8 Q. Can we put up just for the Court and counsel Defense
9 Exhibit 1642. Do you recognize that to be a photograph of
10 Randy Bunkley?

11 A. I do not.

12 Q. Mr. Lutz was a PCAOB inspector at least during part of the
13 time 2015 to 2017, right?

14 A. He was a PCAOB inspector. I don't know what times he
15 worked at the PCAOB.

16 Q. In terms of hiring from the PCAOB, you may recall you
17 talked when Mr. Boxer was cross-examining you about the fact
18 that all your competitor firms were also hiring people from the
19 PCAOB, right?

20 A. Yes.

21 Q. When you embarked on an effort to increase your hiring from
22 the PCAOB, who was your number one candidate?

23 A. Brian Sweet.

24 Q. Do you remember who was your number two candidate before
25 Mr. Sweet got there?

J2rrmid2

Whittle - Cross

1 A. Bob Ross.

2 Q. Let's take a look for Court and counsel at Defense Exhibit
3 1207. Sir, do you see that this is an email chain involving
4 you and Brian Sweet relating to recruiting?

5 A. Yes.

6 Q. It is from May 2015, right?

7 A. That's correct.

8 MR. WEDDLE: We offer Defense Exhibit 1207.

9 MS. MERMELSTEIN: No objection.

10 THE COURT: 1207 is received.

11 (Defendant's Exhibit 1207 received in evidence)

12 Q. Let's start with the second email on this page, so the
13 bottom half of this page. That email is from Joe Lynch, right?

14 A. Correct.

15 Q. It's to you and Brian Sweet, right?

16 A. Yes.

17 Q. The date is May 6, 2015, right?

18 A. Yes.

19 Q. Do you recall that that was Mr. Sweet's third day of work?

20 A. Yes.

21 (Continued on next page)

J2rdmid3

Whittle - cross

1 Q. Joe Lynch you testified earlier, I believe, but just for
2 everyone's reminder, Joe Lynch was a former PCAOB person who
3 worked at KPMG at this time, right?

4 A. That's correct.

5 THE COURT: Hold on one second. My LiveNote isn't
6 working. Is yours?

7 MS. MERMELSTEIN: No, your Honor.

8 MR. WEDDLE: No, I'm sorry, your Honor.

9 (Discussion off the record)

10 BY MR. WEDDLE:

11 Q. So we were talking about this May 6th email that's on the
12 screen, Mr. Whittle, and fair to say that on the third day, you
13 had a conference call with Brian Sweet and Joe Lynch about
14 recruiting, right?

15 A. It would appear, yes.

16 MR. WEDDLE: And, Ms. O'Connor, if we could put on the
17 screen the third page of the exhibit.

18 Q. And part of the attachments to the conference call, or the
19 meeting, on that third day about recruiting, was this list of
20 potential candidates, right?

21 A. Yes.

22 Q. And as you can see, there are three tiers, there is Tier 1,
23 Tier 2 and Tier 3, right?

24 A. Yes.

25 Q. And the first tier is "Approached us and should consider,"

J2rdmid3

Whittle - cross

1 right?

2 A. Yes.

3 Q. And then there is a list of names, right?

4 A. Yes, there are.

5 Q. And it is your understanding that Brian Sweet worked
6 together with Joe Lynch to put together this list, right?

7 A. That's my recollection, yes.

8 Q. And the list are people who are currently at PCAOB, right?

9 A. I believe at the time -- I don't know all the names but
10 some of the names that I do recognize were at the PCAOB.

11 Q. OK. And so, for example, item number 1 is, "David Knibbs,
12 IS3 - core (The KPMG UK)." Do you see that?

13 A. I do.

14 Q. That doesn't mean that David Knibbs is working at KPMG UK,
15 right?

16 A. That's correct.

17 Q. That means that he is on the inspection team for KPMG UK,
18 right?

19 A. That's the way I read it, yes.

20 Q. He is one of the inspectors for an affiliate firm overseas
21 at KPMG LLP, right?

22 A. Yes.

23 Q. You worked at KPMG LLP, right?

24 A. I did.

25 Q. And that's the United States firm, right?

J2rdmid3

Whittle - cross

1 A. It also happens to be -- the "LLP" is also added in certain
2 other countries as well.

3 Q. But the place you worked is the United States firm?

4 A. Correct.

5 Q. And KPMG is a global organization, it has affiliate firms
6 in many countries around the world, right?

7 A. Yes.

8 Q. And on this list -- oh, and so Tier 1 is a list of people
9 who it says "approached us and should consider."

10 Your understanding is that these people have expressed
11 some interest to KPMG in working at KPMG, and the
12 recommendation from Brian Sweet and Joe Lynch is that KPMG
13 should consider hiring them?

14 A. My understanding is that they approached either Mr. Sweet
15 or Mr. Lynch, and that was -- and I would say you're correct,
16 that they were recommending that we consider them for
17 appointment.

18 Q. I see. So you're saying when it says "approached us," that
19 doesn't necessarily mean that they approached someone who
20 worked at KPMG at the time of the approach, they might have
21 approached Brian Sweet before he left PCAOB?

22 A. That's possible.

23 Q. And item 4 on Tier 1 is "Cindy Holder." Do you see that?

24 A. Yes.

25 Q. And there is an entry there that says "KPMG" next to Cindy

J2rdmid3

Whittle - cross

1 Holder, right?

2 A. Correct.

3 Q. That means that she is on the KPMG U.S. inspection team,
4 right?

5 A. That's the way I understand it, yes.

6 Q. Then there is "Grady Peeler." Do you see that?

7 A. Yes.

8 Q. Also on the KPMG U.S. inspection team, right?

9 A. Yes.

10 Q. OK. And then let's take a look at Tier 2. And Tier 2, the
11 category is for "People who have approached us," the same
12 phrase as Tier 1, right?

13 And as to those people, it "needs additional
14 discussion." Do you see that?

15 A. I do.

16 Q. So not a simple recommendation from Joe and Brian but KPMG
17 should considering hiring these people?

18 A. Correct.

19 Q. And the first one on the list is Steve Schindler, who is
20 the KPMG lead, right, inspector?

21 A. For the U.S. inspection, yes.

22 Q. And then there is Ann King on the list, right?

23 A. Yes.

24 Q. And it says she's also on the KPMG U.S. inspection team,
25 right?

J2rdmid3

Whittle - cross

1 A. Correct.

2 Q. And it says "IS3." Do you have an understanding of what
3 "IS3" means next to her name?

4 A. It's some level, some grade at the PCAOB.

5 Q. It is like a rank?

6 A. A rank, you can call it, sure.

7 Q. And it's a lower rank than associate director, for example?

8 A. I understand that to be true, yes.

9 Q. It's a person who is an inspector, not a director level?

10 A. Right.

11 Q. And then you see number 11 on this list is Randy Bunkley.

12 Do you see that?

13 A. I do.

14 Q. And he's also on the KPMG inspection team, right?

15 A. Yes.

16 Q. But it's not -- this is not a list solely of people on the
17 KPMG inspection team, right?

18 A. That's correct.

19 Q. There are some who worked for other firms; some it doesn't
20 even say what their inspection assignment is?

21 A. Correct.

22 Q. OK. Let's take a look at Tier 3.

23 And Tier 3 is a list of people who it says "Not
24 approached but should consider," right?

25 A. It does.

J2rdmid3

Whittle - cross

1 Q. So it looks like that's Joe Lynch and Brian Sweet's view
2 that, hey, these are good people to hire, let's maybe reach out
3 to them, for whatever reason; these are good recommendations
4 for KPMG proactively to make an approach to?

5 A. Certainly we should consider, based on them being placed on
6 the list.

7 Q. OK. And number 1 on that list is Hector Santana, right?

8 A. Right.

9 Q. And he was an associate director?

10 A. Yes.

11 Q. At PCAOB, right?

12 A. Correct.

13 Q. And some -- if we can just look at the whole page, if we
14 can, Ms. O'Connor.

15 Some of the people on this list ended up being hired,
16 right?

17 A. That's correct.

18 Q. And people who -- there may be people who are not on this
19 list who KPMG eventually hired from the PCAOB, right?

20 A. I haven't studied the list but that's possible, yes.

21 Q. Fair to say that by January 2017 -- do you have the
22 timeframe? I am kind of jumping a head a bit. January 2017
23 KPMG had hired about a dozen former PCAOB people, right?

24 A. It sounds about right.

25 Q. So we've already talked about Brian Sweet and Joe Lynch and

J2rdmid3

Whittle - cross

1 Cindy Holder, right?

2 KPMG also hired Louann Sakala, right?

3 A. Correct.

4 Q. And Hector Santana, right?

5 A. Correct.

6 Q. We just talked about him on Tier 3, right?

7 A. Yes.

8 Q. Robert Larson, right?

9 A. Correct.

10 Q. He is on Tier 1.

11 A. Correct.

12 Q. Ryan Adams?

13 A. Correct.

14 Q. John Amraen?

15 A. He is -- he had previously been hired but, yes, he was a
16 KPMG employee.

17 Q. He was hired before Brian Sweet?

18 A. Correct.

19 Q. But he's former PCAOB?

20 A. Correct.

21 Q. Anand Tailor?

22 A. Correct.

23 Q. Scott Henderson?

24 A. Yes.

25 Q. Sean Kelley?

J2rdmid3

Whittle - cross

1 A. Yes.

2 Q. Michael Tucker?

3 A. Yes.

4 Q. All former PCAOB people who came to work at KPMG sometime
5 before January 2017, right?

6 A. Correct.

7 Q. If you take a look at this list that is on the screen, is
8 there anyone else that you see there that you think KPMG ended
9 up hiring?

10 A. I don't see any.

11 Q. And Jeffrey Wada is not on this list, right, and it is
12 spelled W-a-d-a?

13 A. He is not.

14 MR. WEDDLE: If we jump back to the first page,
15 Ms. O'Connor, of this exhibit.

16 Actually, can we just jump to the fourth page of the
17 exhibit and kind of scroll through from there.

18 Q. So part of this exhibit is also a number of résumés, right?

19 A. Yes.

20 Q. And there are some of the people's names that we've already
21 talked about.

22 Let me know if you want me to slow down the scrolling.

23 A. I've seen a couple, yes, that we did talk about.

24 Q. And the last one in the exhibit is David Knibbs. Do you
25 see that?

J2rdmid3

Whittle - cross

1 A. I do.

2 Q. And the one just prior to the last one in the exhibit is
3 Cindy Holder, right?

4 A. Yes.

5 MR. WEDDLE: OK. I'm done with that. Thank you.

6 Q. Now, do you recall in this timeframe, 2015 to 2017 -- or
7 2015 to 2016, let's say, KPMG paid bonuses to eligible KPMG
8 employees who played an important role in recruiting someone
9 who got hired at KPMG?

10 A. I do recall.

11 Q. How did that work?

12 A. It was called a referral bonus, and if you -- if there was
13 an open spot and someone at the staff or manager level -- I
14 think it went to the managers, I don't recall exactly, but if
15 you referred a friend and they came to join the firm, you got a
16 bonus for doing so.

17 Q. And it could be thousands of dollars, right?

18 A. Yes.

19 Q. Do you recall it being around \$10,000?

20 A. I don't recall the exact amounts.

21 Q. And partners who played an important role in recruiting
22 someone to the firm, they were not eligible for this referral
23 bonus program, right?

24 A. Correct.

25 Q. It had to be a nonpartner KPMG employee?

J2rdmid3

Whittle - cross

1 A. I don't recall whether managing directors were eligible or
2 not.

3 Q. OK. Do you remember what Cindy Holder's title was when she
4 came to KPMG?

5 A. Executive director.

6 Q. She would have been eligible for a referral bonus if she
7 recruited people, right?

8 A. She was not a partner or a managing director, so presumably
9 yes.

10 Q. And what about Louann Sakala, would she have been eligible
11 for referral bonuses if she recruited people to KPMG?

12 A. She would not. She joined the firm as a partner.

13 Q. OK. And so I'm going to try to do this in hopefully a
14 speedier fashion but it is going to take a tiny bit of work on
15 your part. I've put in the manila folder that's in front of
16 you two packets of emails, and I want you to take as long as
17 you need for this but I'm just going to give you a preview of
18 what the question is going to be.

19 So, we're going to start with the bigger packet of
20 emails, and the question is going to be: Are these all mails
21 that involved you and recruiting of PCAOB alumni? That's the
22 only question. But if you look through and see if you can -- I
23 can ask you again after you have had a chance to look at it,
24 but just take a look with that question in mind and then I'll
25 ask you afterwards.

J2rdmid3

Whittle - cross

1 A. OK.

2 (Pause)

3 MR. WEDDLE: For the record, your Honor, let me just
4 say the exhibit numbers.

5 It is Defense Exhibit 1017, 1018, 1196, 1200, 1207,
6 1208, 1251, 1374, 1418, 1422, 1458, 1459 and 1481.

7 And the packet includes the email that we just
8 admitted, which is 1207.

9 (Pause)

10 Q. Thank you for taking the time to do that, Mr. Whittle. So
11 the question is are those all KPMG mails relating to the
12 recruitment of PCAOB alumni?

13 A. There were two that one has to -- one is Defense Exhibit
14 1208, which has to do with logistics of Mr. Sweet starting his
15 employment, so he would have already accepted his role.

16 How broadly do you define "recruitment"? I just offer
17 that as on a point.

18 Q. Thank you.

19 A. And with respect to Defense Exhibit 1422, which is an email
20 from Mr. Lynch that describes who the other firms -- "all the
21 firms I've hired," I would not say that is directly related to
22 recruitment by KPMG.

23 Q. Right. And I think we saw another version of that when
24 Mr. Boxer was cross-examining you, and that's the list of
25 people who were working at other firms, right?

J2rdmid3

Whittle - cross

1 A. That were hired -- that had been hired from the PCAOB.

2 Q. OK.

3 MR. WEDDLE: I offer that list of exhibits, your
4 Honor. Would you like me to read them again?

5 MS. MERMELSTEIN: No objection.

6 THE COURT: I think I have the list and they are all
7 received.

8 MR. WEDDLE: Thank you.

9 (Defendant's Exhibits 1017, 1018, 1196, 1200, 1207,
10 1208, 1251, 1374, 1418, 1422, 1458, 1459, 1481 received in
11 evidence)

12 BY MR. WEDDLE:

13 Q. So let's take a look at Defense Exhibit 1459. It is one of
14 the ones in the packet but I am going to put it on the screen
15 or Ms. O'Connor is going to put it on the screen for you, sir.

16 And let's start with the bottom email in the chain.

17 And so this is an email from January 19, 2016. Do you
18 see that?

19 A. Yes.

20 Q. And it is from Brian Sweet to you, right?

21 A. Correct.

22 Q. And could you just read out loud the first paragraph of the
23 email?

24 A. "Tom - I had a meeting with Hector, Louann, Cindy, Mike and
25 Joe and we came up with a short list of folks who we think

J2rdmid3

Whittle - cross

would be a great fit for the international role you mentioned.
Each were strong performers at the PCAOB and have a lot of
international experience (including IFRS and a variety of root
cause, FMM, and industry expertise)."

Q. Then there is a list of people, right?

A. Correct.

Q. And so the people that Brian is referring to -- Brian Sweet
is referring to in the first sentence, those are the first
names of some of the same people we were talking about before
who are former PCAOB people who had been hired at KPMG, right?

A. That's correct.

Q. And so those -- let's see, we have five people -- Hector,
Louann, Cindy, Mike and Joe, that's five people; plus Brian
Sweet, that's six people. Those six people apparently had a
role in putting together this list of recommended recruitment
candidates, right?

A. That's correct.

Q. And this is just to remind everyone, this is half a year
later -- more than half a year later after Brian Sweet started,
right?

A. That's correct.

Q. Then David Knibbs is still first on the list, for example?

A. That is correct.

Q. And some of the other people haven't changed -- or let me
withdraw that.

J2rdmid3

Whittle - cross

1 It is a shorter list than what we looked at before.
2 There may be differences and overlaps. You haven't compared
3 them, right?

4 A. I have not.

5 Q. OK. And Jeffrey Wada is not on this list, right?

6 A. He is not.

7 Q. So let's take a look at the email which is at the top of
8 this email chain, still in Defense Exhibit 1459.

9 I'm sorry, let's look at the middle one. Sorry, I
10 asked for the wrong one.

11 So the middle email is just, let's see, a week or
12 so -- a little more than a week later. Brian Sweet emails you
13 and says: "attached is a résumé for Sean Kelley," right?

14 A. Correct.

15 Q. He is following up on that list before he is sending you a
16 résumé for one of the people, right?

17 A. Presumably, yes.

18 MR. WEDDLE: Actually, if we can take a look back at
19 just the whole page, Ms. O'Connor. Let me see. Yes.

20 Q. Sean Kelley is number 2 on that list in the January 19th
21 email, correct?

22 A. That's correct.

23 Q. And in this middle email, Brian says, "Sean is a top
24 performer at the PCAOB and has significant international
25 inspections experience," right?

J2rdmid3

Whittle - cross

1 A. Correct.

2 Q. He's recommending Sean Kelley, right?

3 A. That's correct.

4 Q. And then let's take a look at -- and he's not in this email
5 that's on the screen, he is not recommending Jeffrey Wada?

6 A. He is not.

7 Q. Let's take a look at Government Exhibit 1437, in evidence.

8 And this is a -- you may never have seen this document
9 before, sir, but this is a -- it has been admitted into
10 evidence as a series of texts or chat conversations -- chat
11 conversations between Brian Sweet and Cindy Holder. Do you see
12 it?

13 A. I do see it.

14 Q. And the date of it is February 24, 2016. Do you see that?

15 A. I do.

16 Q. Let's take a look at -- if you could cull out,
17 Ms. O'Connor, the date and the first message.

18 So this is February 24, 2016, so just a few weeks
19 later than the email we were just looking at, which was
20 January 29, 2016, right?

21 A. Yes.

22 Q. And Brian Sweet, according to this document in evidence, is
23 saying to Cindy Holder: "Wada is the freaking man! I'd so
24 love to hire him. Do you think he'd be willing to come do this
25 international role?"

J2rdmid3

Whittle - cross

1 Do you see that? And then it goes on, right?

2 A. I do see that.

3 Q. Mr. Whittle, did Brian Sweet ever send you Jeff Wada's
4 résumé?

5 A. Not that I recall.

6 Q. In fact, Brian Sweet never recommended to you that KPMG
7 hire Jeff Wada, right?

8 A. Not that I recall.

9 MR. WEDDLE: Thank you, Ms. O'Connor.

10 Q. Now, you testified yesterday -- I am going to change topics
11 now. You testified yesterday that aside from inspection lists
12 which you talked about, Brian Sweet also shared other kinds of
13 confidential information that he had learned about the PCAOB,
14 right?

15 A. That's correct.

16 Q. And you testified that you encouraged him to keep in touch
17 with his former colleagues and to see what he could find out?

18 A. That's correct.

19 Q. And the reason that you did that, that you encouraged him
20 to keep in touch with his former colleagues, was because in
21 your experience in those kinds of situations where people are
22 in contact with PCAOB employees, information flows, right?

23 A. That's fair.

24 Q. And you knew that from your own personal experience, too,
25 in terms of your contacts with PCAOB employees, right?

J2rdmid3

Whittle - cross

1 A. We certainly would have conversations about KPMG matters,
2 and it was part of the normal dialogue with PCAOB inspectors.

3 Q. Yeah. And statements when you were in contact with PCAOB
4 inspectors, information flowed to you, right?

5 A. Yes.

6 Q. So let's take a look at Defense Exhibit 1535, which is in
7 evidence.

8 MR. WEDDLE: It also has a sticker on it, your Honor,
9 for Government Exhibit 184. I believe it was admitted as 1535.

10 Q. And, sir, do you see that this -- can we pull up the top
11 half of the page?

12 This appears to be meeting notes of a meeting from
13 January 24, 2017, and it is a meeting between KPMG personnel
14 and PCAOB personnel. Do you see that?

15 A. Yes, I see it. They are meeting notes between the KPMG and
16 PCAOB personnel.

17 Q. These aren't your notes, right?

18 A. They are not.

19 Q. And the document that's in evidence says that the meeting
20 was held telephonically, right?

21 A. Yes.

22 Q. And you were a participant in this meeting, right?

23 A. Yes.

24 Q. And let's take a look at the first text paragraph
25 underneath this table.

J2rdmid3

Whittle - cross

1 And you see that the first item on the agenda, or as
2 the first item on the agenda Steve Schindler announced -- he
3 says: "I want to make you aware" -- leaving out the word
4 "is" -- "that we have formed a new group we call the Banking
5 Inspections Group, known as 'BIG'. This group is going to work
6 across all firms. We won't have a dedicated KPMG Banking Team
7 this year."

8 Do you see that?

9 A. I do.

10 Q. Do you remember this announcement in January -- January 24,
11 2017 from Steve Schindler?

12 A. I remember the discussion that it occurred on January 24th.
13 I don't recall that date, but I do recall having heard that
14 from Mr. Schindler.

15 Q. And you will agree with me that this was an announcement by
16 Mr. Schindler?

17 A. Yes.

18 Q. And let's take a look at the second page of this document
19 at the top.

20 You had a follow-up question for Mr. Schindler.

21 Can you put up Mr. Schindler's answer there, too?

22 And you asked, after he announced this thing, the
23 creation of the BIG Banking Inspections Group, you said: "is
24 part of what you want to gain is having the same individuals do
25 inspections across all the firms so they have better

J2rdmid3

Whittle - cross

1 perspectives and are leveraging their skill set? Is that a
2 good way of thinking of the goal here?"

3 Do you remember asking that?

4 A. I don't remember if those were the exact words but
5 certainly consistent with what I would have -- the type of
6 thing I would have asked him.

7 Q. And Mr. Schindler said, "Yes, that's correct," right?

8 A. That's what it says, yes.

9 Q. And what you're trying to convey there is that -- maybe in
10 a polite way -- you were saying that maybe having a dedicated
11 Banking Team that operated across not just KPMG but PwC and
12 Deloitte and Ernst & Young and so on, the type of review they
13 did might be more consistent across firms, is that right?

14 A. That would be fair.

15 Q. And it would depend less on the personalities or the
16 particular let's say method used by particular bank inspections
17 who might only be previously working on one audit firm's
18 inspections?

19 A. I'm not sure ultimately that the perspectives and
20 individual personalities don't ultimately come through in an
21 inspection, but in terms of trying to gain a level of
22 consistency, certainly that would be the objective I was trying
23 to -- would be trying to get across.

24 Q. Now, but you, sir, had already heard before this
25 announcement by Mr. Schindler in this meeting on January 24th,

J2rdmid3

Whittle - cross

1 you had already heard that they were creating this Banking
2 Inspections Group called BIG, right?

3 A. I believe so, yes.

4 MR. WEDDLE: Let's take a look at Defense Exhibit
5 1635.

6 It is in evidence but for a nonhearsay purpose, your
7 Honor.

8 Q. And I want to focus you -- oh, actually, let me just -- OK.
9 So if you just take a look -- you're not on this email chain,
10 right?

11 A. I'm not.

12 Q. OK. So just to orient you, at the bottom there is an email
13 from December 12, 2016 and it says, "Helen Munter just
14 announced FS pooled team concept to the SEC reviewing partners.
15 That stinks. Chuck."

16 Do you see that?

17 A. Yes.

18 Q. And then let's take a look at the top email.

19 So, this is an email at the top also from December 12,
20 2016, and it's from Ryan Sweet to Cindy Holder, right, not
21 including you on the email chain?

22 A. Correct.

23 Q. And Brian says, "Thanks for forward. Tom was prepping with
24 her for this session last week and she announced it to him,
25 too, so it's officially public." Do you see that?

J2rdmid3

Whittle - cross

1 A. I do.

2 Q. Then he goes on to say: "I need to get together with Bob
3 to get the details, but it will likely be in January."

4 Do you see that?

5 A. I do.

6 Q. So, Helen Munter -- who was Helen Munter in December of
7 2016?

8 A. She was the director of inspections for the PCAOB.

9 Q. And fair to say that from time to time she came and gave
10 talks to KPMG personnel, right?

11 A. Yes.

12 Q. And in fact, do you recall that she did give a talk to a
13 group of KPMG personnel who were partners at KPMG on or about
14 December 12, 2016?

15 A. Not exactly the date, but in December of each year we would
16 hold our SEC reviewing partner conference and that's where she
17 would come to speak to us.

18 Q. OK. And you had a separate meeting in advance of her talk
19 to the KPMG partners to help her prepare for it, right?

20 A. Yes.

21 Q. And that took place the week prior, right?

22 A. Typically, yes, at some point before we would get together
23 and go over the topics for her discussion.

24 Q. OK. So the week of December 6, 2016, you met with Helen
25 Munter and talked to her to prepare for this speech or talk she

J2rdmid3

Whittle - cross

1 was going to give to KPMG partners the next week, right, on
2 December 12th?

3 A. Sometime before. I couldn't tell you exactly which day or
4 week it was but prior to the -- prior to her talk, yes.

5 Q. And in that prep, she told you that they were going to
6 create this new Banking Inspections Group, called BIG, right?

7 A. She did tell me they were going to create this new way to
8 operate on bank inspections, yes.

9 Q. So she had kind of beaten the announcement by Steve
10 Schindler by more than a month, right?

11 A. Based on the dates, yes.

12 MR. WEDDLE: And let's take a look at another exhibit.
13 This one is not in evidence, so if we could just put it on the
14 screen for the Court and counsel. Defense Exhibit 1636.
15 Sorry. Court, counsel, and the witness.

16 Q. I want to focus you on the email at the bottom, which is
17 from December 2, 2016. That is an email to you and a number of
18 other people relating to PCAOB inspections. Do you see that?

19 A. Yes.

20 Q. And the email just above -- and that's from Louann Sakala,
21 right?

22 A. Correct.

23 Q. And the email just above that is from Brian Sweet to the
24 same group of people, including you, right?

25 A. Yes.

J2rdmid3

Whittle - cross

1 Q. And it still says "PCAOB inspections," right?

2 A. Correct.

3 Q. December 2, 2016, right?

4 A. Yes.

5 Q. And then the top email on this chain is another email, not
6 including you, but it's from Brian Sweet to four KPMG employees
7 on the same day forwarding this same chain of emails, right?

8 A. Yes.

9 Q. So this email chain appears to be an email chain involving
10 you for the most part and a number of other KPMG employees,
11 right?

12 A. Yes.

13 MR. WEDDLE: I offer it, your Honor.

14 MS. MERMELSTEIN: No objection, your Honor.

15 THE COURT: Defense 1636 is received in evidence.

16 (Defendant's Exhibit 1636 received in evidence)

17 MR. WEDDLE: Now let's look at the bottom email in the
18 chain for the jury as well.

19 BY MR. WEDDLE:

20 Q. So December 2, 2016, that's ten days before the Helen
21 Munter speech we were just talking about, right?

22 A. Correct.

23 Q. And a week before your private meeting with Helen Munter
24 where you heard the information, more or less?

25 A. More or less, yes.

J2rdmid3

Whittle - cross

1 Q. And Louann is sending an email to George Hermann, right?

2 Who was he at the time?

3 A. He was the head of the Audit Group.

4 Q. OK. And you?

5 A. Correct.

6 Q. And then John Mucha. Who was he at the time?

7 A. John was a partner in my group.

8 Q. OK. And David Britt. Who was he at the time?

9 A. David was partner in the Audit Group that focused on
10 banking.

11 Q. And she is cc'ing Brian Sweet and Hector Santana, right?

12 A. Correct.

13 Q. And she says: "Hi - just letting you know. I heard today
14 that the PCAOB is putting together a GNF Banking Team, which
15 will have all the dedicated financial service inspectors in it.
16 It will be led by Dave Mardjanov" -- I apologize to him if I am
17 mispronouncing his name. It says, "(AD, was the USTL for
18 Deloitte)."

19 Do you see that?

20 A. I do.

21 Q. And then it goes on.

22 And GNF Banking Team, the phrase "GNF," that means the
23 sixth biggest accounting firms in the United States, right?

24 A. I believe so, yes, the largest firms.

25 Q. It is the Big Four, including KPMG and Deloitte, for

J2rdmid3

Whittle - cross

1 example?

2 A. Correct.

3 Q. And also Grant Thornton, right?

4 A. Correct.

5 Q. And BDO, right?

6 A. Correct.

7 Q. And so it says it will be led by Dave Mardjanov (AD, was
8 the USTL for Deloitte).

9 Can you decode for us those acronyms.

10 A. "AD" I believe stands for associate director, and "USTL" I
11 think stands for U.S. team leader.

12 Q. OK. And then at the end of this email, she says, "The
13 banking team will be used to staff all financial service
14 inspections (both domestic and international). This means you
15 could see Bob Ross again next year on financial service
16 inspections, as this will be a pool to select from and
17 schedule."

18 Do you see that?

19 A. I do see that.

20 MR. WEDDLE: And let me look at the whole page for a
21 second. Let's look at the email just above this.

22 Well, actually, let me back up.

23 Q. So from the Louann email from December 2nd, she was
24 reporting to you, and a number of other partners at KPMG, that
25 she had heard this news that got announced almost two months

J2rdmid3

Whittle - cross

1 later by Steve Schindler in a meeting that you were at, right?

2 A. Yes.

3 Q. OK. And the -- and so then Brian responds to everybody on
4 December 2nd, and he says: "Thanks for the heads-up on this
5 Louann. I know this had been in the works for quite some time
6 and Bob has suggested to me that he is going to be also taking
7 some sort of leadership/oversight role in it as well."

8 Right? And then he goes on?

9 A. Correct.

10 MR. WEDDLE: So we just looked -- actually, we are
11 done with that.

12 Done with that. Thank you.

13 Q. So let's take a look at another example, Defense Exhibit
14 1195, not in evidence.

15 Sir, would you like a hardcopy of this? I can hand
16 you one.

17 A. No, it is OK.

18 Q. It is a several-page document. Just let me know.

19 But let's take a look at the second page for a second
20 and then we'll go back up and talk about the first.

21 (Pause)

22 And so the second page, do you see there is an email
23 from Ann King? She is a PCAOB inspector at the time, May 2015,
24 right?

25 A. She was with the PCAOB, yes.

J2rdmid3

Whittle - cross

1 Q. OK. And then if we will jump back to page 1 of the
2 exhibit, there is an email conversation that ultimately ends up
3 in your in box among only KPMG people, right?

4 A. That's correct.

5 Q. And if Mr. Whittle could look at the whole page and see if
6 this is sort of the conversation at KPMG after Ann King's
7 email, right?

8 A. Maybe go to the second page.

9 Q. I mean, that is -- Ann King, who doesn't work at KPMG,
10 sends an email and then there are three emails after that that
11 are only KPMG people, right?

12 A. Yes.

13 MR. WEDDLE: I offer Defense Exhibit 1195.

14 MS. MERMELSTEIN: No objection, your Honor.

15 THE COURT: 1195 is received.

16 (Defendant's Exhibit 1195 received in evidence)

17 BY MR. WEDDLE:

18 Q. So let's just look briefly at page 2 just so the jury can
19 see the Ann King email.

20 And it is talking about issuer selection and focus
21 areas, right?

22 And you're not on this email, right, Mr. Whittle?

23 A. I am not.

24 Q. OK. And then if we will look at the next email
25 chronologically.

J2rdmid3

Whittle - cross

1 So this is Asad Chaudry emailing other KPMG people,
2 not including you, Mr. Whittle on May 13, 2015, right?

3 A. Yes.

4 Q. And Asad Chaudry says: "All, received this unofficially
5 ... please keep confidential for now."

6 Do you see that?

7 A. I do.

8 Q. And then it goes on to say a number of other things, right?

9 A. I'm sorry?

10 Q. I'm sorry. I just said it goes on to say other things, and
11 you just have to say yes or no.

12 A. Yes, it does go on to say other things.

13 Q. Then if we take a look at the top email on this chain. It
14 is for -- Scott Henderson sends it to you and Mr. Mucha and
15 Brian Sweet, right?

16 A. Yes.

17 Q. And Scott Henderson, again, is a former PCAOB person who
18 was at that time working at KPMG, right?

19 A. Correct.

20 MR. WEDDLE: I'm done with that exhibit. Thank you.

21 Q. Do you also remember hearing in January 2016 that someone
22 at KPMG found out from the PCAOB that oil and gas would be a
23 very big focus for them in the 2015/2016 inspections; do you
24 recall that?

25 A. I don't.

J2rdmid3

Whittle - cross

1 MR. WEDDLE: Let's take a look at a document not in
2 evidence. If we could show Mr. Whittle and the Court and
3 counsel Defense Exhibit 1331. And we really only need to look
4 at the center of the page, so the Darin Kempke email through
5 item number 1.

6 So take a look at this email. You are not part of it,
7 right?

8 A. I'm not.

9 Q. And I'm going to invite your attention to the item number
10 1. If you could just read that to yourself not out loud. Just
11 read the first couple of sentences of that to yourself.

12 (Pause)

13 You have read it?

14 A. I read point 1, yes.

15 Q. Does that refresh your recollection that people at KPMG had
16 heard that a focus for the PCAOB would be oil and gas and a
17 huge focus?

18 A. I'm sorry, it does not.

19 MR. WEDDLE: I offer Defense Exhibit 1331.

20 MS. MERMELSTEIN: Objection, your Honor. The witness
21 didn't recognize it and is not on it.

22 THE COURT: Sustained.

23 BY MR. WEDDLE:

24 Q. Now, focusing now on Brian Sweet again, so we started this
25 discussion talking about Brian Sweet from time to time getting

J2rdmid3

Whittle - cross

1 what in your view is confidential information from the PCAOB,
2 including but not limited to the lists that you've testified
3 about, right?

4 A. Yes.

5 Q. And when Brian Sweet told you -- and often if he heard
6 information, he would email you and other people about it,
7 right?

8 A. That's correct.

9 Q. And what he said in emails, what his source was for the
10 information, you had no personal knowledge about whether that
11 was true or not, right?

12 A. I would not be part of the conversation so, therefore, I
13 didn't have a basis one way or the other.

14 (Continued on next page)

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J2rrmid4

Whittle - Cross

1 Q. You were just relying on what Brian Sweet says, right?

2 A. That's correct.

3 Q. To the extent it mattered to you, right?

4 A. To the extent he sent me information, it would apply
5 equally.

6 Q. Take a look at the smaller packet I gave you. I think
7 that's six emails. I'll try to do the same thing. I'll tell
8 you what the question is before I ask you to take a look at
9 them. All of these six emails are emails involving you and
10 Brian Sweet where Brian Sweet is conveying some information
11 about PCAOB information to you and other people. I'll say for
12 the record the exhibit numbers. Take a look at them and see if
13 you could confirm that simple fact. It's Defense Exhibit 1019,
14 1096, 1174, 1197, 1199, 1389. Ready?

15 A. Yes.

16 Q. Thank you, sir. Let's start with the last one, which is
17 Defense Exhibit 1389. Here he is not really conveying
18 information to you, he is proposing a phonecall with you,
19 right?

20 A. That's correct.

21 Q. You talked about encouraging Mr. Sweet to keep contact with
22 PCAOB people, right?

23 A. Yes.

24 Q. In your view, that was part of his job, right?

25 A. Yes.

J2rrmid4

Whittle - Cross

1 Q. When he did that, if he found out information, it was part
2 of his job not to keep it secret but rather to share it with
3 the right people at KPMG, right?

4 A. Yes.

5 Q. And in the ordinary course of business, he typically did
6 that by email, right?

7 A. Yes, sometimes in person.

8 Q. Not always but often, right?

9 A. Often, yes.

10 Q. Those emails were kept in the ordinary course of business
11 at KPMG, right?

12 A. Yes.

13 Q. We have them here, right?

14 A. We certainly do.

15 MR. WEDDLE: I offer those exhibits, your Honor.
16 There is a mixture of statements in them that might be subject
17 to 801 and statements that are not. To the extent that they
18 are subject to 801, I offer them pursuant to 803(6), your
19 Honor.

20 MS. MERMELSTEIN: Your Honor, for the record the
21 documents plainly do not meet the business records exception.

22 MR. WEDDLE: I object to the commentary.

23 MS. MERMELSTEIN: It's only to the basis for which Mr.
24 Weddle offered them. We have no objection to their admission,
25 but we have an objection to that purported basis.

J2rrmid4

Whittle - Cross

1 THE COURT: They are received. 1019, 1096, 1174,
2 1197, 1199, 1389 received.

3 (Defendant's Exhibits 1019, 1096, 1174, 1197, 1199,
4 and 1389 received in evidence)

5 Q. Thank you, sir. I am not going to ask you about them
6 anymore. You can set all those emails aside.

7 In your direct testimony, early in your direct
8 testimony, so a while ago now, you talked about kind of the
9 mechanics of inspections by the PCAOB. Do you recall that?

10 A. Yes.

11 Q. You said that the PCAOB communicates to KPMG its selection
12 of particular audits to inspect either with a phonecall or
13 email. Do you recall that?

14 A. Yes.

15 Q. Do you remember who it was that typically made those
16 phonecalls or sent those emails in the 2015-2016 time frame?

17 A. It was typically whoever Steve Schindler's deputy was or
18 second person in line that. That changed over time, but that
19 was the typical person that would do that.

20 Q. It was sometimes Ann King, right?

21 A. I don't know. I didn't always get those directly, so I'm
22 not sure who it was.

23 Q. It could just be a phonecall, right?

24 A. Sure.

25 Q. If it was a phonecall, it didn't come to you, right?

J2rrmid4

Whittle - Cross

1 A. Occasionally it would come to me, but most of the time it
2 came to Meredith Hardigsty, who was a director on my team.

3 Q. As far as you know, these PCAOB people were making these
4 phonecalls or sending these emails as part of their jobs,
5 right?

6 A. Yes.

7 Q. As far as you knew, was there like a formal board
8 resolution at the PCAOB authorizing them to make those
9 phonecalls or send those emails?

10 A. Not that I'm aware of.

11 Q. You talked about the March 28, 2016 meeting, right?

12 A. Yes.

13 Q. Are you with me? Okay. I'm going to try not to repeat
14 what everyone else did. During this meeting on March 28, 2016,
15 in your presence, while you were there, the term "stealth
16 re-review" was not used in that meeting at all, right?

17 A. Correct.

18 Q. You described in your direct testimony that at some point
19 you heard someone use the phrase "stealth re-review," right?

20 A. That's correct.

21 Q. It was after that meeting, right?

22 A. Yes.

23 Q. You said you heard it from a member of Mr. Britt's team, do
24 you recall that?

25 A. Yes.

J2rrmid4

Whittle - Cross

1 Q. Who was it that you heard it from?

2 A. I can't remember her name at the moment.

3 Q. Was it Jen Lauer?

4 A. Yes, it was Jen Lauer. Thank you.

5 Q. Was she former PCAOB?

6 A. No.

7 Q. When she said that, you cringed, right?

8 A. I did.

9 Q. Let me jump ahead to the preliminary list. I have a couple
10 of questions about that. In your direct testimony and this
11 morning on questioning by Mr. Boxer you talked about learning
12 about a preliminary inspection list in the January time frame,
13 January 2017 time frame, right?

14 A. Correct.

15 Q. In your direct testimony, in asking you about that event,
16 the prosecutor first directed your attention to January 9,
17 2017. Do you remember that?

18 A. Yes.

19 Q. Do you have a memory that you first heard about the
20 inspection list on January 9, 2017, or in terms of your memory
21 was it just around that date?

22 A. Around that date.

23 Q. You said that Brian Sweet contacted you, you didn't contact
24 him, right?

25 A. Correct.

J2rrmid4

Whittle - Cross

1 Q. How did Brian Sweet contact you?

2 A. I believe it was by phone.

3 Q. Could have been in person?

4 A. Could have, but --

5 Q. Your best recollection.

6 A. My best recollection is it was by phone.

7 Q. It was right after lunchtime, right?

8 A. I don't remember the time of the day.

9 Q. Where were you when you discussed this preliminary list for
10 the first time with Brian Sweet?

11 A. I believe I was in the office.

12 Q. In your office?

13 A. In my office in New York, yes.

14 Q. Who else was there when you had this discussion with Brian
15 Sweet in your office in New York?

16 A. It was just Brian and I.

17 Q. About how long was your initial discussion with Brian
18 Sweet, probably by phone, about the preliminary list?

19 MS. MERMELSTEIN: Objection, your Honor, to the
20 misstatement of the testimony.

21 THE COURT: "About how long was your initial
22 discussion." I think he did say it was probably by phone,
23 right? I think he said, "My best recollection was that it was
24 by phone."

25 MS. MERMELSTEIN: It's fine, your Honor.

J2rrmid4

Whittle - Cross

1 THE COURT: Would you repeat the question, please.

2 MR. WEDDLE: Yes.

3 Q. About how long was your initial discussion with Brian
4 Sweet, probably by phone, about the preliminary list?

5 A. I don't recall how long when we spoke about it.

6 Q. Either in that initial discussion or let's say the day
7 after that initial discussion, did you have a discussion with
8 Brian Sweet about the preliminary list that also included Cindy
9 Holder?

10 A. I don't recall speaking to Ms. Holder about it.

11 Q. Does that mean it didn't happen or you're just not --

12 A. I don't have a recollection of speaking to her about it.

13 MR. WEDDLE: Could we pull up just for the witness,
14 the Court, and counsel 3526-3, the 14th page. Actually, let's
15 start with this page for a second.

16 Q. Take a look at the top half of this page, Mr. Whittle. Do
17 you see that?

18 A. I see it.

19 Q. Now if you would take a look at page 14 of 3526-3, page 14.
20 In the third paragraph down it starts, "In January."

21 MR. WEDDLE: If we could pull up one more line, Ms.
22 O'Connor. Perfect.

23 Q. Do you see in the third line from the bottom is the word
24 "he"?

25 MR. WEDDLE: Can you highlight that sentence, please,

J2rrmid4

Whittle - Cross

1 Ms. O'Connor. Actually, that's great.

2 Q. Sir, do you remember meeting with the prosecution team --

3 MS. MERMELSTEIN: Your Honor, objection to the method
4 that is being used here.

5 THE COURT: Sustained.

6 MR. WEDDLE: I'm just trying to orient the witness,
7 your Honor. It's a separate question. I haven't asked the
8 question that I think the prosecution is --

9 MS. MERMELSTEIN: Shall we approach, your Honor? I
10 don't think this is a proper way to proceed. If Mr. Weddle
11 wants to ask, without referencing the document, whether or not
12 viewing it refreshes Mr. Whittle's recollection --

13 MR. WEDDLE: I may not be doing that, your Honor. We
14 haven't gotten there yet.

15 MS. MERMELSTEIN: I don't think talking about what the
16 document is in this fashion is a proper way to do this. I
17 think that objection was sustained. I can say more at sidebar
18 or we can move on.

19 MR. WEDDLE: Why don't we do this, your Honor.

20 I am probably going to come back to this, Ms.
21 O'Connor, but could you take it off the screen for a second.

22 Q. Sir, do you recall meeting with the prosecution team on or
23 about July 30, 2018?

24 A. I met with them on numerous occasions in the summer. That
25 specific date, not sure. But in that time frame, yes.

J2rrmid4

Whittle - Cross

1 Q. How many times did you meet with them starting in the
2 summer of 2018 before you entered into a cooperation agreement?

3 A. Several times, three or four times. I'm not sure exactly
4 how many.

5 Q. When you met with the prosecution team, there were normally
6 more than one prosecutor, right?

7 A. Yes.

8 Q. And normally more than one law enforcement agent, right?

9 A. Yes.

10 Q. You did not take notes, correct?

11 A. I did not.

12 Q. Sir, do you recall when you met with the prosecution team
13 telling the prosecution team that you didn't bring Holder --
14 sorry -- Sweet did not bring Holder on a discussion of the
15 preliminary list?

16 MS. MERMELSTEIN: Again objection to the propriety of
17 this method, your Honor.

18 THE COURT: Are you refreshing or not?

19 MR. WEDDLE: I'm doing the question right before
20 refreshing. I don't know if he recalls it or not.

21 MS. MERMELSTEIN: The witness has testified that he
22 doesn't remember. He can be refreshed or not, but that's it.

23 THE COURT: Sustained as to that.

24 MR. WEDDLE: Ms. O'Connor, can you put that
25 highlighted line back up, please.

J2rrmid4

Whittle - Cross

1 Q. Sir, does looking at the highlighted line on the screen
2 refresh your recollection that in your meeting, in a meeting
3 with the prosecution team, you said Sweet did not bring Holder
4 in a discussion of the preliminary list?

5 MS. MERMELSTEIN: Objection again to the method.

6 THE COURT: Sustained.

7 Q. Sir, does looking at that document refresh your
8 recollection about Cindy Holder being present for a discussion
9 of the preliminaries?

10 A. The document disappeared.

11 MR. WEDDLE: May we have it back.

12 A. Can you repeat the question.

13 Q. Does looking at this document refresh your recollection
14 about Cindy Holder not being present for a discussion of the
15 preliminary list?

16 A. It doesn't really help me. I just don't recall whether we
17 had any discussion about Ms. Holder or whether she was included
18 or not.

19 Q. When you discussed the list, the preliminary list, with Mr.
20 Sweet, do you recall anyone having written down on a piece of
21 paper in your presence the list?

22 A. No.

23 Q. Let me jump ahead to February 2017. You talked about
24 receiving a final inspection list, what you understood to be a
25 final inspection list in early 2017, right?

J2rrmid4

Whittle - Cross

1 A. Right.

2 Q. I mean in early February 2017.

3 A. Correct.

4 Q. Before, you were asked questions about that on direct
5 testimony, the prosecutor directed your attention to February
6 3, 2017. Do you recall that?

7 A. Yes.

8 Q. Do you remember the date or do you think it was just around
9 then, from your recollection?

10 A. My recollection was it was on a Friday, and I believe
11 Friday was the 3rd.

12 Q. So you have a pretty clear recollection that it was on a
13 Friday?

14 A. Yes.

15 Q. You said on direct that Brian Sweet called you?

16 A. Yes.

17 Q. What time of day was it that Brian Sweet called you?

18 A. I would be guessing to say it was in the afternoon.

19 Q. You don't have to guess.

20 A. I don't have a specific time in mind as to what it was.

21 Q. Where were you when you received a call from Brian Sweet
22 about the final inspections?

23 A. I was working at home that day.

24 Q. Do you recall what phone he called you on?

25 A. All my calls would come in to my cell phone.

J2rrmid4

Whittle - Cross

1 Q. To your knowledge, where was Brian Sweet that day?

2 A. I don't know where he was that day.

3 Q. How long was the call?

4 A. It wasn't very long. I don't know exactly how long, but it
5 wasn't a lengthy call. It wasn't as long as the call we had on
6 the following Monday.

7 Q. That call was about how long, the following Monday call?

8 A. An hour and a half or so.

9 Q. Was anyone present when you had this first call with Brian
10 Sweet about the final inspection list?

11 A. No.

12 Q. Now I'm going to back up to kind of the beginning of your
13 direct testimony, all the way back to when you started this.
14 You talked in your testimony about the importance of first
15 impressions. Do you remember that?

16 A. Yes.

17 Q. Brian Sweet makes a good first impression, right?

18 MS. MERMELSTEIN: Objection, your Honor.

19 THE COURT: You can answer if you have an answer.

20 A. I believe he does.

21 Q. Sir, is it fair to say that sometimes first impressions can
22 be deceiving?

23 MS. MERMELSTEIN: Objection, your Honor.

24 THE COURT: Sustained.

25 MR. WEDDLE: No further questions, your Honor.

J2rrmid4

Whittle - Redirect

1 THE COURT: Thank you.

2 MS. MERMELSTEIN: I'm very brief, your Honor.

3 THE COURT: Redirect, Ms. Mermelstein.

4 **REDIRECT EXAMINATION**

5 BY MS. MERMELSTEIN:

6 Q. I'll be quick. Do you remember the exact times or dates
7 with respect to the January and February of 2017 events?

8 A. I'm sorry. The January 17?

9 Q. January and February of 2017.

10 A. The exact times, no.

11 Q. I think you testified on cross-examination that you were
12 not sure with respect to a particular conversation, whether it
13 took place in person or on the phone. Let me pull up just for
14 the witness, the Court, and counsel 3526-3 page 14.

15 MR. BOXER: Your Honor, I object. Unless he adopts
16 the exhibit in some way, I don't think it will refresh him.

17 MS. MERMELSTEIN: You can refresh with literally
18 anything.

19 MR. WEDDLE: Your Honor, that is not the objection.
20 It is not the type of refreshing. It is the predicate for
21 doing so that is the objection.

22 MS. MERMELSTEIN: Your Honor, the witness testified he
23 didn't recollect, and I was going to see if I could refresh his
24 recollection.

25 THE COURT: You may. Overruled.

J2rrmid4

Whittle - Redirect

1 MS. MERMELSTEIN: Let me ask you to highlight that one
2 sentence, Mr. Cooney.

3 Q. Mr. Whittle, let me ask you to read just to yourself the
4 sentence that begins towards the end of the second line. Are
5 you finished reading?

6 A. Yes.

7 MS. MERMELSTEIN: You can take that down, Mr. Cooney.

8 Q. Does that refresh your recollection about whether or not
9 your conversation with Mr. Sweet in January 2017 about the
10 preliminary list was in person or on the phone?

11 A. No, it does not.

12 Q. You just don't remember one way or the other?

13 A. No.

14 Q. All right. You were asked a number of questions on
15 cross-examination about whether or not you ever attended
16 meetings with the SEC. Did you ever have discussions with Mr.
17 Middendorf about him attending meetings with the SEC?

18 A. Yes.

19 Q. Did you ever provide information to Mr. Middendorf for
20 those meetings?

21 A. Yes. In preparation I usually get a request about the
22 latest inspection results, where we stood, that type of
23 information.

24 Q. Let me direct your attention to Government Exhibit 925 in
25 evidence. If we can go to page 5. On cross-examination Mr.

J2rrmid4

Whittle - Redirect

1 Boxer asked you to read from some of these statements by the
2 SEC chair. Let me ask you to read beginning underneath
3 "Responsibility of Regulators" with "Let me first return."

4 A. Would you like me to read that?

5 Q. Yes, please.

6 A. "Let me first return briefly to the PCAOB. We work closely
7 and collaboratively with the board to achieve our shared goals
8 on behalf of investors, and it is an extraordinarily important
9 partnership."

10 Q. Now let me ask you to continue, beginning "For the
11 commission's part."

12 MR. BOXER: Objection, your Honor. There is no
13 question and it was in for a limited purpose. That portion
14 that the witness just read needs to be directed to a question
15 about state of mind. Otherwise --

16 MS. MERMELSTEIN: Since Mr. Middendorf is a recipient
17 of this, I think its contents to go to state of mind.

18 THE COURT: I will allow it for state of mind, not for
19 the truth of the matters asserted.

20 MS. MERMELSTEIN: Thank you, your Honor.

21 Q. Mr. Whittle, if you could read that paragraph.

22 A. "For the commission's part, our staff works closely with
23 the PCAOB and all of the parties in the financial reporting
24 chain to ensure the reports continue to serve to protect
25 investors and build confidence in our markets. This work, of

J2rrmid4

Whittle - Redirect

1 course, reflects the work of our office of the chief
2 accountant, expertly led by Jim Schnurr, who you will hear from
3 shortly, and includes the extensive and very impressive work
4 with the division of corporation finance in reviewing and
5 commenting on the financial reports of over 4,000 registrants
6 each year. It also includes a strong enforcement program that
7 prioritizes financial reporting cases."

8 Q. Thank you.

9 MS. MERMELSTEIN: Let's take that down, Mr. Cooney.

10 Q. I want to ask you a few follow-up questions about the March
11 28, 2016 call. Mr. Boxer asked you a number of questions about
12 exactly when Mr. Middendorf arrived to that call and whether it
13 was before or after you had dialed in. To be clear, was he on
14 the call when you talked about using the ALLL monitoring
15 program to conduct secret re-reviews of the workpapers?

16 MR. BOXER: Objection.

17 THE COURT: Overruled.

18 MR. BOXER: To the form of the question.

19 THE COURT: Rephrase as to his knowledge.

20 Q. You participated in the entirety of the call, is that
21 right?

22 A. Yes.

23 Q. Based on your participation in that call, was Mr.
24 Middendorf on the call at the time that you talked about using
25 the ALLL monitoring program to conduct secret reviews of the

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Whittle - Redirect

1 workpapers?

2 MR. BOXER: Objection.

3 THE COURT: Overruled.

4 A. Yes.

5 Q. Was he, based on your participation, on the call when you
6 discussed which engagement partners you would reach out to and
7 which engagement partners he would reach out to to arrange for
8 access to workpapers so re-reviews could be conducted?

9 A. Yes.

10 Q. Was he on the call when Mr. Sweet indicated that he had
11 obtained confidential PCAOB information about the 2016
12 inspections?

13 MR. BOXER: Objection.

14 THE COURT: Overruled.

15 A. Yes, he was.

16 Q. You were asked a number of questions about the PCAOB
17 statement to audit committees that it does not give comments
18 just based on documentation. In your experience did the
19 quality of the workpapers themselves affect whether or not a
20 comment was given?

21 A. Yes, I believe they did.

22 Q. Did the 2015 re-reviews work on improving documentation or
23 work on improving audit work?

24 A. I look at them as somewhat indistinguishable. The
25 documentation documents, the work, and the way you describe it

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Whittle - Redirect

1 and how you describe it and the fullness of the description
2 makes a big difference to an inspector.

3 Q. What was the purpose of conducting those re-reviews?

4 A. To improve the adoption, improve the work, and show it in
5 its best light to avoid comments from the PCAOB.

6 Q. You were asked about your reaction and Mr. Middendorf's
7 reaction to learning that Brian Sweet told Diana Kunz that she
8 was going to be inspected. Were you concerned that Mr. Sweet
9 was using the confidential PCAOB information or concerned that
10 he was telling people that it was confidential PCAOB
11 information?

12 MR. BOXER: Objection.

13 THE COURT: Overruled.

14 A. Could you repeat the question.

15 Q. Of course. Were you concerned when you learned about Mr.
16 Sweet's notification to Ms. Kunz that he was using the
17 confidential information that had been received or that he was
18 disclosing to other people that KPMG was in possession of
19 confidential information?

20 A. That he was disclosing it to other people and we could get
21 caught.

22 Q. You were asked a number of questions about Mr. Sweet and
23 KPMG's efforts to predict what engagements might be inspected,
24 and I think you said standing alone there is nothing wrong with
25 making predictions, is that right?

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Whittle - Redirect

1 A. Yes.

2 Q. Is it wrong to use confidential PCAOB information in order
3 to make those predictions?

4 A. Yes.

5 Q. Is there any doubt in your mind that it was wrong to have
6 the PCAOB's 2015 inspection list before those inspections had
7 been noticed to KPMG?

8 A. I believe it was wrong.

9 Q. Was it wrong to have the 2016 list before those inspections
10 were noticed to KPMG?

11 A. Yes.

12 Q. Was it wrong to use that information in an effort to
13 improve inspection results?

14 A. Yes.

15 Q. Was it wrong to have the 2017 preliminary list?

16 A. Yes.

17 Q. Was it wrong to have the final 2017 list?

18 A. Yes.

19 Q. Does anything about the fact that, for example, Mr.
20 Middendorf received a draft agenda from a PCAOB board member
21 alter your assessment that it was wrong to have any of these
22 lists?

23 MR. BOXER: I object, your Honor.

24 THE COURT: Overruled.

25 A. I'm sorry. Could you repeat the question?

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Whittle - Recross

1 Q. Sure. You testified that you understood Mr. Middendorf had
2 received a draft agenda from a PCAOB board member. Did the
3 fact that he received a draft agenda change in any fashion your
4 understanding that it was wrong to possess a confidential PCAOB
5 inspection list?

6 A. No, it doesn't change my view.

7 Q. If the PCAOB's requirements for inspections were too
8 onerous, would that justify using the inspection lists that
9 were obtained, the confidential inspection lists, in an effort
10 to secretly affect the inspection results?

11 MR. BOXER: Objection.

12 THE COURT: Overruled.

13 A. No.

14 MS. MERMELSTEIN: Nothing further.

15 THE COURT: Is there anything further?

16 MR. BOXER: Yes, your Honor.

17 THE COURT: Mr. Boxer.

18 RECROSS-EXAMINATION

19 BY MR. BOXER:

20 Q. Mr. Whittle, you were just asked some questions about Mr.
21 Sweet's behavior in February of 2017 when you learned that he
22 had reached out to Diana Kunz, correct?

23 A. Yes.

24 Q. Were you angry because Mr. Sweet had also used the
25 information that he had received regarding the lists?

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Whittle - Recross

1 A. Could you repeat the question?

2 Q. You understood that Mr. Sweet had reached out to Diana
3 Kunz, correct?

4 A. Yes.

5 Q. You had also understood that he had asked for access to the
6 eAudit file for Ms. Kunz' engagement that appeared on the list,
7 correct?

8 A. I was unaware that he asked for access to her workpapers.

9 Q. You didn't know about that fact?

10 A. I did not.

11 Q. So, when you heard from Mr. Middendorf on February 8th
12 about Mr. Sweet, the only information you were made aware of
13 was that Mr. Sweet had told Diana Kunz about the existence and
14 his possession of the list, is that correct?

15 A. That he had told her she was going to be inspected, yes.

16 Q. Other than that piece of information, you were unaware of
17 anything else that Mr. Sweet had informed Ms. Kunz or asked Ms.
18 Kunz, correct?

19 A. That's correct.

20 MR. BOXER: Nothing further, your Honor.

21 MR. WEDDLE: One line of cross that may take up to
22 five minutes, your Honor.

23 THE COURT: Are you okay for five minutes?

24 THE JURY: Yes.

25 THE COURT: All right.

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Whittle - Recross

1 RECROSS-EXAMINATION

2 BY MR. WEDDLE:

3 Q. Mr. Whittle, the prosecutor asked you to read from a press
4 report about a speech by Mary Jo White. Do you recall that?

5 A. Yes.

6 Q. That quote that you read ended with a reference to the
7 SEC's strong enforcement program, do you remember that?

8 A. Yes.

9 Q. Sir, in any of your meetings with the prosecution team, was
10 anyone from the SEC present?

11 A. Yes.

12 MS. MERMELSTEIN: Objection. Beyond the scope.

13 THE COURT: Sustained.

14 Q. Sir, a civil action, that is, a noncriminal action, has
15 been brought against you by the SEC, right?16 MS. MERMELSTEIN: Objection to beyond the scope of
17 redirect.

18 THE COURT: Sustained.

19 MR. WEDDLE: Your Honor, it is directly relevant to
20 that reference.21 Q. Are you aware that there are SEC lawyers in the courtroom
22 right now?

23 MS. MERMELSTEIN: A continued objection.

24 THE COURT: Sustained.

25 MR. WEDDLE: Nothing further.

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Whittle - Recross

1 (Witness excused)

2 THE COURT: Folks, we are going to break for lunch.

3 It is 1:05. We will begin at 2:05. Have a good lunch
4 everybody.

5 (Jury not present, witness not present)

6 THE COURT: Anything to address?

7 MS. KRAMER: I think Mr. Rubino may be called after
8 lunch at some point, your Honor. My current plan is to show
9 him what is marked as Government Exhibit 452, the full two
10 pages, so that he can authenticate them as from the notebook,
11 and not offer anything through him. Then I'll offer, whatever
12 the final ruling is from your Honor, what is admissible through
13 Mr. Sweet, so that comes in tomorrow. I don't have to recall
14 Mr. Rubino. I want to raise that now so if there are any
15 issues with that, we can address it.

16 MS. MERMELSTEIN: One scheduling issue. We indicated
17 to the defendants that we expected to call Zach Greenwood next.
18 I expect he will still testify this afternoon. But we have two
19 document custodians from the PCAOB and an IT professional from
20 KPMG, all of whom are very short and all of whom are out of
21 town and have travel issues. I expect to put them on right
22 after lunch so we make sure we finish, and then we'll go to
23 Zach Greenwood.

24 MS. LESTER: One thing on the notes. That suggestion
25 Ms. Kramer made is fine with us. I think it makes sense. But

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Whittle - Recross

I do have additional points I could make to the Court about why we think the totality of the document should come in with the exception of the portion on the second page that we discussed. I would prefer not to announce those in front of the prosecution because they reveal our cross-examination strategy. I just wanted to offer that to the Court. There is some hesitation about the entirety of the document. I do have some additional points I can make.

THE COURT: Why don't we come back at 2:00 and address that.

MR. BOXER: One final thing, your Honor. The government submitted a letter last evening about two of our witnesses, Mr. Blake and Mr. Hanson. In their letter they acknowledge admissible bases for each of them, and then they go through the rule 26.2 statements we produced about what wouldn't be admissible.

I don't think it is appropriate that we should have to respond to that letter. We don't preview our objections to their 3500 material and very often they don't elicit a lot of the things that are in their 3500 material. I will do my best and intend to adhere to the rules of admissibility, and when it comes to character witnesses those rules as well. That is how I propose proceeding.

If your Honor wants a letter response, of course we will to it. But I don't think it is an appropriate approach

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Whittle - Recross

1 where they look at our materials and then try to litigate pre
2 the witness hitting the stand what can and can't be elicited.
3 My request would be that I not have to respond to this
4 submission, but I of course will take instruction from the
5 Court.

6 THE COURT: That's fine. I don't think you need to
7 respond.

8 MR. BOXER: Mr. Blake would be tomorrow and Mr. Hanson
9 Monday morning.

10 THE COURT: If there are things we can anticipate in
11 the morning, particular categories or anything, that's fine, we
12 can do that orally.

13 MR. BOXER: I will look over it again more carefully,
14 and if there is something that I can tell we are going to be
15 joining issue, I will alert the Court.

16 THE COURT: That's fine. No need to write a letter.

17 MS. KRAMER: Your Honor, we wrote the letter in an
18 effort to avoid litigating this at lengthy sidebars in front of
19 the jury. Of course, we recognize that everything in a
20 witness's 26.2 statement may not be what is elicited on the
21 stand. But I think both parties move to preclude the testimony
22 of certain witnesses for similar reasons. So we would like to
23 address the issues that we have raised in our letter before the
24 witness is on the stand and what we believe are arguably
25 improper questions are put to the witness in front of the jury.

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Whittle - Recross

1 MR. BOXER: I appreciate the reasoning for it. But it
2 requires us to preview our direct examination, and I don't
3 think that is appropriate.

4 THE COURT: At the end of the day we can speak broadly
5 to make sure that I have the right understanding of what is in
6 and what is out just generally in a way that I don't think
7 requires you to preview details about your direct.

8 MR. BOXER: I will review the letter again with that
9 spirit in mind. Thank you, your Honor.

10 THE COURT: Have a good lunch.

11 (Luncheon recess)

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Whittle - Recross

AFTERNOON SESSION

2:15 p.m.

(Jury not present)

THE COURT: Good afternoon. I wanted to ask regarding the notes, the Brian Sweet notes, Exhibit 452, where is it in the 3500 material that he describes that? Is there a particular place? Maybe you can just summarize for me again.

MS. KRAMER: Certainly, your Honor. I don't have the page handy, but I can summarize above the line on the first page.

THE COURT: Yes. On the first page, what is it that you could represent, and they can correct or clarify, how he described the different categories?

MS. KRAMER: On the first page, let's call it the top third above that line were generally his notes to himself in preparation for the meeting.

THE COURT: The meeting with Jim and Dave?

MS. KRAMER: Yes, the meeting with Jim and Dave.

THE COURT: What did you say about below the line?

MS. KRAMER: Below the line on the first page reflects the note that he took during the portion of the meeting when Jim Liddy was speaking on the phone. That is consistent with his testimony about that. I think he testified that Liddy said please don't hesitate to speak up, and the first line says, "Please don't be shy."

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Whittle - Recross

1 THE COURT: Remind me of the situation. Was Mr.
2 Middendorf in the room or on the call or what?

3 MS. KRAMER: Middendorf and Sweet were in a conference
4 room together at KPMG and Liddy was on the phone.

5 THE COURT: So the notes he said below the line were
6 the ones when Liddy was speaking from the phone?

7 MS. KRAMER: Yes. That is consistent with his
8 testimony too. The note about people is consistent with his
9 testimony that they discussed people and sort of what the PCAOB
10 thought of them.

11 THE COURT: All right.

12 MS. KRAMER: To the left of the vertical line, second
13 page, are the notes that Sweet took during his meeting with
14 manufacture after Liddy hung up the phone.

15 THE COURT: Got it. Is that consistent with your
16 understanding of what he said in 3500 and/or his testimony?

17 MS. LESTER: I think that is consistent with the 3500
18 material, your Honor, but we just had the opportunity to
19 inspect the actual notebook. After that review, I actually
20 think there is some question as to whether the information on
21 the left-hand side of page 2 was all written at the same time,
22 because of the difference in pen. If your Honor were to look
23 at the original, we could explain what we mean.

24 MS. KRAMER: I assume the reference is to the fact
25 that line 6 is in a different color ink. Is there another

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Whittle - Recross

1 difference?

2 MS. LESTER: I'm not an expert, but it appears to
3 match up with some of the ink used on the right-hand side of
4 the second page. I can't quite recall if Mr. Sweet was asked
5 to explain that in the course of his preparation with the
6 government. It is not included in what Ms. Kramer just
7 described.

8 Also, you can see a line through number 1 at the top
9 of the page, "internal inspections." That diagonal line
10 appears to be in that same blue pen that number 6 is written in
11 and that the vertical line underneath the 4/1KVN, those all
12 appear to be in the same pen.

13 MS. KRAMER: I don't see the relevance of that, your
14 Honor.

15 THE COURT: What is your request? Is it still to
16 include the first page and the left-hand side of the second
17 page or has it changed?

18 MS. LESTER: That is still what we would propose be
19 admitted, your Honor. I think we would reserve perhaps
20 depending on what comes out, the ability to reference the
21 original notepad.

22 THE COURT: Do we have the original notepad?

23 MS. KRAMER: We do, your Honor. We have no plans to
24 offer it, but simply to then the date what we do intend to
25 offer.

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Whittle - Recross

1 MR. WEDDLE: Your Honor, as everyone was talking, I
2 went through the 3500. I think where Mr. Sweet talks about his
3 notes is 3522-25.

4 THE COURT: Thank you.

5 MS. MERMELSTEIN: Your Honor, we will pull it up for
6 you.

7 MR. WEDDLE: I agree with all of Ms. Lester's
8 arguments. The fact that I am inviting everyone's attention to
9 this 3500 material I think is no substitute for live testimony.
10 I think there has been no actual live testimony that
11 establishes the predicate facts that make this document
12 relevant at all under 104.

13 MS. KRAMER: That is ludicrous, your Honor. We
14 weren't allowed to show the witness this. We certainly tried,
15 twice. What we are offering as the proponent of the evidence
16 is the prior consistent statements. We are not offering the
17 whole thing, nor do we have to.

18 MS. LESTER: Your Honor, for the reasons we discussed
19 earlier on the record, we do think that the portions that I
20 have already explained to the Court that we would like to come
21 in should come in. And I renew my offer to the Court of
22 further explanation of the relevance of the two pages, why it
23 is necessary to have the two pages together, which I would be
24 happy to explain to the Court further but would prefer not to
25 say in front of the government.

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Whittle - Recross

1 THE COURT: I'm sort of inclined to accept the rule of
2 completeness argument as to the left side of the second page.
3 But because there is sort of a divide between that insofar as
4 the entirety of that section might be appropriate for
5 completeness purposes, I just don't know that his notes to
6 himself go to that same point and the parts that straight-
7 forwardly, the Liddy part, need to come in on that
8 justification of completeness.

9 MS. LESTER: Your Honor, I think I can explain that
10 further. That is the part I would prefer not to say in front
11 of the government. But if your Honor is not going to allow me
12 to say it *ex parte*, I can explain further why we believe the
13 first page should come in in its entirety as well.

14 THE COURT: We don't need to decide it right now,
15 right? You need to know by the end of the day?

16 MS. MERMELSTEIN: It affects the government's
17 decision-making about a number of the witnesses who are
18 testifying today. It doesn't have to be this minute, but I do
19 think we would strongly prefer not to wait until the end of the
20 day to sort this out. I'm sensitive to demanding that the
21 defendants proffer in advance what they are arguing. But given
22 the fairly clear lack of the need to include the first page for
23 rule of completeness, I don't believe it is fair to the
24 government to allow the defendants to argue that *ex parte* and
25 not be permitted to respond to whatever that argument is about

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Whittle - Recross

1 whether or not something should be admitted.

2 MS. LESTER: Your Honor, I can give one small example.

3 THE COURT: Okay.

4 MS. LESTER: The first page is relevant. First of
5 all, the top says "Jim and Dave." I understand the government
6 agrees that that portion could come in. Mr. Sweet has said in
7 his preparation that those are his prep notes before the
8 meeting.

9 The below the line portion which are supposedly Mr.
10 Liddy's comments or the part where Mr. Liddy is talking, first
11 of all, there is plenty of room on this page to continue the
12 points that supposedly Mr. Middendorf is making as part of the
13 same meeting. But instead on the second page there is
14 discussion or notes about many of the same things that are at
15 the top of the first page.

16 For example, the three names that appear at the very
17 top -- Steve Georgian, John Mucha, John Broderick -- those same
18 names appear under number 4 -- John B, Steve, John Mucha. That
19 is just one example of the similarities between what he has
20 described as his prep notes on the first page at the top and
21 the notes on the second page. There are others.

22 MS. KRAMER: Your Honor, that just has nothing to do
23 with what the rule of completeness means or says or how it is
24 applied. The Second Circuit in Gupta affirmed a similar
25 exclusion. I just don't see it. They can certainly

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Whittle - Recross

1 cross-examine Sweet about whether these are his notes from what
2 Mr. Middendorf said. If they want to suggest that he was
3 telling himself that Stonegate, as he was asked about the day
4 before, is a gray area but that he has to share insights and
5 add value wherever he can and remember where his paycheck comes
6 from, they can make that argument from the portion that we are
7 intending to offer.

8 MS. LESTER: Your Honor, the entire context helps make
9 clear that it is more likely that these notes are Mr. Sweet's
10 notes to himself, not notes of things that were said to him.

11 MS. MERMELSTEIN: I just think it is an enormous
12 stretch to say that the context makes that clear from the
13 example Ms. Lester has given. I think we are perhaps doing an
14 overly close read about a person's decision to start notes on
15 the top of a new page when a new person is speaking. That
16 seems perfectly reasonable. It is also not at all surprising
17 that the thoughts Mr. Sweet had about preparing for a meeting
18 touched on the very same topics that were in fact touched on in
19 that meeting. Indeed, that seems perfectly obvious.

20 The suggestion that because the topics overlap from
21 the preparation and the meeting, that those were not Sweet's
22 notes of what Middendorf said but were rather Sweet's
23 preparation notes or other notes to himself is preposterous. I
24 think as Ms. Kramer said, the facial meaning of Mr. Sweet's own
25 notes is nonsensical as notes to himself made without prompting

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Whittle - Recross

1 by any third party to remember where his own paycheck comes
2 from.

3 MS. LESTER: Your Honor, again, I can give more
4 examples if the Court would find it helpful, including the
5 phraseology is similar between the top of page 1 and what is on
6 the left-hand side of page 2. So another example, under
7 "little wins," the box on the right-hand side, it says "copy of
8 AS 5." Then on page 2 under dash "little things," in paren it
9 says "AS 5 copy."

10 THE COURT: I see what you are saying. That shows
11 that he planned to speak about something and then he spoke
12 about something.

13 MS. LESTER: He spoke about it or he wrote notes again
14 repeating the same thing he had already prepped on with himself
15 before. It supports our position, your Honor, I think it is
16 legitimate cross-examination as to whether Mr. Sweet can be
17 believed that these are the notes from a conversation with Mr.
18 Middendorf that represent Mr. Middendorf's statements when the
19 same phrases that Mr. Sweet has used himself in his own
20 preparation are repeated on the second page. I think that is
21 completely legitimate cross-examination.

22 MS. KRAMER: Your Honor, nothing about remembering
23 what his paycheck comes from or a gray area is in his prep
24 notes. I don't really understand how this is the argument that
25 is being made when we did additional investigation because of

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Whittle - Recross

1 concerns that defense counsel raised that these notes had been
2 somehow planted by Sweet in his office during the internal
3 investigation or altered by him to investigate whether he had
4 access to his office. Either they were made up and were
5 planted by him or now they are not notes of what Middendorf
6 said, all of those are arguments but none of those make the
7 entire document admissible under the rule of completeness.

8 MS. LESTER: Just one more thing, your Honor. That
9 last point about the paycheck, on the prep notes Mr. Sweet says
10 "not upsetting PCAOB by hiring." He's making notes to himself
11 about why it's okay that he is now on the other side of the
12 table. So it is not completely improbable that he would be
13 saying as a phrase that he might plan to use, "I know where my
14 paycheck comes from."

15 With respect to Ms. Kramer's last argument about my
16 questions about when Mr. Sweet had access to his office, I
17 asked those questions because in our letter we asserted that
18 arguably Mr. Sweet had a motive to fabricate as of the time
19 these notes were supposedly written. That is, he knew he had
20 already stolen confidential information, he acknowledged that
21 he knew at the time that he was breaking the ethics rules of
22 the PCAOB.

23 So there is a plausible argument that if he was
24 recording things that he thought helped show that he was facing
25 pressure, he would keep that notebook from that time period

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Whittle - Recross

1 where he had written those things down and not destroy it,
2 whereas he chose to destroy other things that he thought were
3 incriminating, such as the list that he testified he burned in
4 his barbecue. That was the reason for my questions about
5 whether he had access to his office after he learned about the
6 internal investigation.

7 Your Honor, if you are comparing the two pages, I will
8 just lay it all out. If you look at right on her "monthly
9 meetings" on page 2, it says dash, I can't actually read the
10 first word, but it says something like re--

11 MS. KRAMER: Reinforce.

12 MS. LESTER: "Reinforce how significant PCAOB takes
13 it." On the first page it says under "little wins," the last
14 entry, "Monthly meeting is of significance, importance, to" I
15 believe that is a P.

16 On the left-hand side, under "three main things DT and
17 PWC did," the first one is "change in tone" and the second one
18 is "internal inspections."

19 If you look at the second page, "internal inspections"
20 is number 2 and the "change in tone" is referenced under number
21 3, "monthly meetings emphasize tone at the top every time."

22 There are a few other small things that are similar,
23 but I think these items that I pointed out in total show that
24 there is a colorable argument that these notes were prepared by
25 Sweet not in the context of conversation with someone else,

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1 that is, reflecting that person's statements, but either
2 perhaps reflecting his own statements or reflecting his own
3 preparation in connection with an entirely separate meeting

4 MR. WEDDLE: Your Honor, may I add one thing to this?
5 I may be wrong, but I believe that the first time we have a
6 written record of Brian Sweet interpreting these notes is from
7 January 29, 2019. Less than one month ago is the first time he
8 apparently met with the government and interpreted these notes.
9 In that context the fact that he started lining up these notes
10 with attributions to David Middendorf has, let's say, multiple
11 highly plausible explanations.

12 One of them is that he is tailoring his testimony and
13 attributing statements to David Middendorf because he is
14 looking at black and white and blue ink cryptic notes. They
15 give him plenty of room to come up with a story line that helps
16 him. This is in the face of, as Ms. Lester has said, other
17 indications in the 3500 material and in the testimony.

18 He claimed that he on a routine basis got rid of his
19 notes. In the 3500 material Mr. Whittle at one point told the
20 government that when he saw Brian Sweet's office, he saw a
21 stack of notebooks there that he assumed were from the PCAOB.
22 I believe other witnesses in the 3500 material have talked
23 about what an assiduous note take Mr. Sweet was.

24 So I think the entirety of the circumstances here,
25 including the completeness of the exhibit, are important

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Whittle - Recross

1 because they are relevant, they are probative of alternative
2 arguments.

3 THE COURT: It is true that the rule of completeness
4 is limited to what in fairness should be included with the
5 properly offered prior consistent statement. The tricky thing
6 here is I don't think, just looking at them, the rule of
7 completeness necessarily does it until you play out this
8 argument, and the question is how plausible is that argument
9 that these similarities slash differences support an argument
10 about the notes.

11 It is true that these two pages of notes relate to one
12 meeting. I am persuaded that --

13 MS. KRAMER: Your Honor, may I say one thing in
14 response to what Mr. Weddle said?

15 THE COURT: Yes.

16 MS. KRAMER: I fear we are going to end up going down
17 a prior consistent statement rabbit hole if this is where
18 things are going. Because on July 25, 2017, in the 3500
19 material that we are putting up on the screen here, without
20 looking at the notepad, Mr. Sweet recounted this conversation.
21 It is 3522-30, page 8, from July 25, 2017. He recounted this
22 meeting then consistent with his testimony and with the
23 notepad, without referring to the notes whatsoever and said
24 exactly the same things.

25 If you are going to allow defense counsel to have this

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whole sideshow about what his prep meeting notes were and the shocker that he discussed some of the things he prepared to discuss and go into what is going to amount to probably at least an hour of cross-examination about the authenticity of notes that we are offering three lines of, then we are going to respond by putting in the July 25, 2017, prior consistent statement and elicit that he told us all of this when he wasn't looking at the notes, we didn't show him the notes. It is going to be, I fear, a big sideshow.

This is a prior consistent statement that we are putting in to directly respond to the claim of recent fabrication and turning it into this whole other hearing is far beyond the scope of the rule of completeness.

THE COURT: It is a prior consistent statement, but it is not a small matter. This is important testimony. The fact that he said something consistent in July 2018, after he was cooperating, is not inconsistent with a somewhat conspiratorial theory.

MS. KRAMER: Except that I think Mr. Weddle just talked about how we showed him the notebook a month ago, and surprise, surprise, he conformed his testimony to it. That is refuted.

THE COURT: I am not relying on that particular point. It is just overall it certainly provides context to the notes that he was taking in these two pages. I think it could avoid

J2rrmid4

Whittle - Recross

1 the possibility that there is something misleading in certain
2 of these notes that the government wants to offer. If they
3 believe Sweet's testimony, obviously they are not going to
4 accept any alternative interpretation.

5 MS. KRAMER: The fact that he prepared for the
6 meeting, your Honor, it's a different set of statements
7 entirely. It doesn't place the statement that we are offering
8 in context. The case that I handed up this morning excised a
9 different portion of the same memo and affirmed that. Same
10 thing in Gupta.

11 I certainly understand the argument they want to make,
12 but allowing the other notes in, it's almost impeachment by
13 extrinsic evidence on a collateral matter. It is not
14 completeness of the actual statement we are offering.

15 MS. LESTER: Your Honor, I disagree with that. But to
16 the extent that it could be viewed as extrinsic evidence, I
17 think arguably it goes to bias and improper motive for the
18 reasons we have already explained.

19 THE COURT: I am going to allow the first page and the
20 second page, not including the section on the right.

21 MS. KRAMER: Thank you, your Honor.

22 THE COURT: I am also going to read what I said I was
23 going to read about Stephanie Rodriguez's testimony. I think I
24 will do that when they come in.

25 MS. KRAMER: Did your Honor consider the government's

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Whittle - Recross

1 request to include the admonition to the jury of why it was
2 being stricken?

3 THE COURT: Yes. I was going to include that.

4 MS. KRAMER: Thank you, your Honor.

5 THE COURT: Anything else?

6 MR. BOXER: No, your Honor.

7 THE COURT: Who is the next witness?

8 MS. MERMELSTEIN: May we have one moment, your Honor?

9 THE COURT: Sure.

10 MS. KRAMER: Your Honor, our next witnesses are the
11 PCAOB witnesses who are going to be putting in the records
12 relating to the costs. We have some concern about confusing
13 the jury if you instruct them to disregard the testimony of
14 Stephanie Rodriguez on this issue immediately before the
15 witnesses testify on this issue.

16 THE COURT: I would assume it would be better to do it
17 before than after. I could do it later.

18 MS. KRAMER: That's fine, your Honor. None of them
19 are great choices, obviously, from our perspective.

20 THE COURT: I understand. Do you want to go ahead and
21 bring the witness in or should we do the jury first?

22 MS. MERMELSTEIN: We can do the witness first.

23 (Continued on next page)

J2rrmid4

Edwards - Direct

1 (Jury present)

2 THE COURT: Good afternoon, folks. I was going to
3 apologize for the long recess, but you have already thanked me.
4 So you're welcome. Occasionally we have legal issues that we
5 need to address and occasionally I'm running late because of
6 other things. So I apologize and you're welcome, both.

7 Before we continue with the testimony, one thing I
8 wanted to state is that you heard testimony during the first
9 week of trial from a witness named Stephanie Rodriguez. A
10 certain portion of her testimony involved an estimate of the
11 cost to the PCAOB of employees' time in replanning and
12 reinspecting certain audits in 2016 and 2017. I'm striking
13 that testimony and I instruct you to disregard that specific
14 testimony. You are not to speculate as to why that testimony
15 is being stricken.

16 We will now continue with the government's next
17 witness.

18 MS. MERMELSTEIN: Thank you, your Honor. The
19 government calls Latoya Edwards.

20 LATOYA EDWARDS,

21 called as a witness by the government,

22 having been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MS. MERMELSTEIN:

25 Q. Ms. Edwards, how old are you?

J2rrmid4

Edwards - Direct

1 A. 30.

2 Q. Where are you currently employed?

3 A. PCAOB.

4 Q. How long have you been employed at the PCAOB?

5 A. Since June 2015.

6 Q. What is your current title?

7 A. Analyst.

8 Q. What are your general duties and responsibilities as an
9 analyst at the PCAOB?

10 A. I manage a scheduling system called Stafftrack, and I also
11 provide reporting based on inspection, staffing, and head
12 count.

13 Q. Do you as well work on inspections yourself, or do you just
14 provide staffing and scheduling support?

15 A. Just staffing and scheduling support.

16 Q. Do you work or do you do staffing for a particular division
17 of the PCAOB?

18 A. Yes, DRI, which is division of registration and
19 inspections.

20 Q. If you know, does that division include the office of
21 research and analysis known as ORA, or is that a separate
22 group?

23 A. Separate.

24 Q. What, if any, system does DRI use to schedule PCAOB
25 inspector time?

J2rrmid4

Edwards - Direct

1 A. We use a system called Stafftrack.

2 Q. What is Stafftrack?

3 A. Stafftrack is a scheduling system that maintains a record
4 of inspections and also the inspectors' schedule for the given
5 year.

6 Q. How does information about scheduling make its way into
7 Stafftrack?

8 A. We receive requests from either the scheduling champion or
9 approved request from the inspector.

10 Q. What is a scheduling champion?

11 A. A scheduling champion is -- all the inspectors are on a
12 team. Each team has a scheduling champion that maintains their
13 scheduling. They send it to us, and we update Stafftrack.

14 Q. So just a point person on scheduling?

15 A. Yes.

16 Q. Is information in the Stafftrack system created, kept, and
17 maintained in the ordinary course of the PCAOB's business?

18 A. Yes.

19 Q. Is the information created by persons with knowledge of or
20 created from information transmitted by persons with knowledge
21 of the information shown?

22 A. Yes.

23 Q. Is the information created at or near the time the
24 information became available?

25 A. Yes.

J2rrmid4

Edwards - Direct

1 Q. Let me direct your attention to Government Exhibits 132 to
2 135 for identification. They are going to come up on your
3 screen. There is also a folder next to you in a manila
4 envelope. If it is easier to look at them in hardcopy, you've
5 got hardcopies there. Take your time and let you ask you if
6 you recognize those.

7 A. I do.

8 Q. What are they?

9 A. They are reports based on the planning time for a given
10 period of time for the KPMG assignment code.

11 Q. Is this data extracted from Stafftrack?

12 A. Yes.

13 Q. It relates I think you said to a particular firm?

14 A. Yes.

15 Q. Which firm is that?

16 A. KPMG.

17 Q. Does it relate to a particular kind of work for that firm?

18 A. The data is filtered on planning time.

19 Q. What does that mean, that you filter the data on planning
20 time?

21 A. This report here is a pivot of the mega schedule and is
22 sorted by the assignment, which would be KPMG, and the job
23 code, which would be planning.

24 Q. Did you extract the data contained in Government Exhibits
25 132 through 135 from the larger dataset at Stafftrack?

J2rrmid4

Edwards - Direct

1 A. Yes.

2 MS. MERMELSTEIN: The government offers Government
3 Exhibits 132 through 135.

4 MR. OHTA: Your Honor, could we have a moment for a
5 sidebar, please?

6 THE COURT: Yes.

7 (Continued on next page)

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Edwards - Direct

1 (At the sidebar).

2 MR. OHTA: Your Honor, could you reserve your ruling
3 on the entry of this document into evidence. While Ms.
4 Mermelstein did attempt to lay a foundation for business
5 records, we are objecting based on the relevance because right
6 now we know why the government wants to put it into evidence.
7 They want to show actual costs of the planning process.

8 All we know right now is we have a scheduler that
9 schedules hours and it's in the Stafftrack system and that's
10 it. It's not actual hours worked. As it stands right now,
11 it's just a schedule of costs. It is a record of just a
12 schedule, not actually hours worked. We would like the
13 opportunity to cross-examine on that fact. Of course, the
14 Court can make a determination of whether or not it is
15 relevant.

16 MS. MERMELSTEIN: I really first of all can't
17 understand why this is being raised at the sidebar now for a
18 witness whose testimony was disclosed and for whom documents
19 were disclosed. The notion that this is not admissible is
20 preposterous. It is the most classic example of a business
21 record.

22 To the extent that there is some challenge and if you
23 want to ask do you know for sure that every hour that was
24 scheduled to be worked was worked, you can do that. That does
25 not make them inadmissible. That goes to weight, not

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Edwards - Direct

1 admissibility. That is an argument to be made. There is no
2 basis to reserve decision. They should be received in evidence
3 now.

4 THE COURT: Is this greater than the people who did
5 the planning and reinspections that we talked about, or is this
6 a broader universe?

7 MS. MERMELSTEIN: It is actually a smaller universe,
8 your Honor. As the witness testified, this only relates to
9 hours for members of the department of inspection. For
10 example, it does not include any hours worked by members of
11 ORA, which is significant. But for ease of proving it, we are
12 willing to accept a smaller group. This is hours for which
13 KPMG inspectors were scheduled to work on the job of planning.
14 It seems very straightforward.

15 THE COURT: Is it all planning?

16 MS. MERMELSTEIN: It is for designated time periods
17 that correspond to the time periods for which there has been
18 testimony were the planning periods for those four relevant
19 time periods.

20 THE COURT: So it is specific to, say, the 10
21 reinspections, the planning relating to the reinspected audits?

22 MS. MERMELSTEIN: It does not relate to the planning
23 for the 10 reinspected audits. I think there has been some
24 confusion in the way the defendants have raised their objection
25 to Ms. Rodriguez's testimony. She in fact did not testify

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Edwards - Direct

1 about the cost of planning the additional 10 inspections. She
2 testified about doing the 10 additional inspections. There was
3 actually virtually no cost of planning the 10 additional ones.

4 They chose the 2017 group and then they used the same
5 group of financial institutions and also did the 2017. It
6 includes the planning for 2015, the planning for 2016, the
7 initial planning for 2017, and the rate planning for 2017.
8 That is why there are four exhibits broken out into time
9 frames.

10 THE COURT: Is it somehow limited to the
11 reinspections?

12 MS. MERMELSTEIN: There were no reinspections for
13 2015.

14 THE COURT: Right.

15 MS. MERMELSTEIN: In 2016 it relates to the cost of
16 creating the list in the first instance. It doesn't relate to
17 the cost of performing new inspections. That would be a
18 different job code, not planning. We are not doing that. For
19 2017 it has the initial planning costs and then the replanning
20 costs.

21 THE COURT: Why is it not relevant?

22 MR. OHTA: Your Honor, you have a proffer by the
23 government on what it purports to show. But as it stands right
24 now, that is not what it shows. It is just hours based on
25 someone's schedule. That's all it is. It's just based on what

J2rrmid4

Edwards - Direct

1 hours have been scheduled for these particular people who put
2 in planning.

3 Although planning is in Stafftrack, I don't know how
4 planning gets into Stafftrack, I don't know what these people
5 are doing. Is it random? Who makes the selections? Who makes
6 the determination on whose schedules or who does the actual
7 planning? Maybe I'm in the field but by some mistake the
8 department puts in planning; those aren't planning hours,
9 that's fieldwork hours. We just don't know. That's why I want
10 to cross-examine the witness.

11 MS. LESTER: Beyond that, your Honor, as Ms.
12 Mermelstein just explained, these planning hours that are
13 scheduled relate to time periods. My understanding is the
14 planning time would not actually be relevant to -- I guess I'm
15 a little unclear. I should ask the prosecutor. It goes to the
16 value, the argument as to all of lists?

17 MS. MERTELSTEIN: Exactly, your Honor. There has been
18 an argument floated by the defense that the list doesn't have
19 financial value to the PCAOB. It does because it costs a lot
20 of money to create. PCAOB has obviously been harmed in other
21 financial ways by the costs of having to do additional work.
22 That is not what this evidence is about. It's about the cost
23 of creating the list.

24 The notion that it is possible that someone didn't
25 work those hours or there is an error in the business records

J2rrmid4

Edwards - Direct

1 doesn't render the business record inadmissible. It would be
2 nonsensical. We would have to call every person on the
3 planning to testify to how many hours he work.

4 This is a business record. That's why we have the
5 business records exception. There can be any amount of
6 cross-examination on whether or not this is a perfect record,
7 but it is a completely fair representation about the planning
8 hours, which is completely consistent with Ms. Rodriguez
9 testimony that it was about 5,000 hours.

10 MS. KRAMER: There was also testimony from Mr. Sweet
11 about the planning team and what they to and how the different
12 accounting firm teams are divided.

13 MS. LESTER: So, your Honor, as we moved prior to
14 trial in our motion in limine, the dollar amount, the
15 quantification after the fact of the value of the lists or the
16 information compiled within the PCAOB is a completely
17 fabricated exercise that has no relevance to this jury's
18 determination about whether the confidential information at
19 issue had value within the meaning of the wire fraud statute.

20 THE COURT: I understand the arguments. I ruled on
21 that. I find that it is admissible as a business record. And
22 I find that the challenges being raised go to weight, not
23 admissibility. So the objections are overruled but noted for
24 the record.

25 (Continued on next page)

J2rdmid5

Edwards - direct

1 (In open court)

2 THE COURT: Government's Exhibits 132 through 135 are
3 received.

4 (Government's Exhibits 132-135 received in evidence)

5 MS. MERMELSTEIN: Thank you, your Honor.

6 Can we publish 132 to the jury, please.

7 BY MS. MERMELSTEIN:

8 Q. Ms. Edwards, for what time period does this reflect the
9 planning hours worked by the KPMG inspection team?

10 A. August 2014 through May of 2015.

11 Q. On line 4, where it says "Job Code Planning," what does
12 that mean?

13 A. That is the sorting from the Mega Report or the largest
14 schedule for just that job code.

15 Q. These hours all pertain to planning and not some other
16 activity?

17 A. Correct.

18 Q. And where it says "KPMG 14 "in row 8, what does that mean?

19 A. That is the inspection or the assignment code for 2014.

20 Q. For KPMG?

21 A. For KPMG.

22 MS. MERMELSTEIN: If we can scroll to the bottom of
23 this document, please.

24 Q. In yellow, what does it reflect about the total number of
25 hours worked on schedule for planning for PCAOB inspectors for

J2rdmid5

Edwards - direct

1 the time period listed at the top of the chart for August 2014
2 to May 2015?

3 A. So this is the total time for the 2014 time August through
4 December, and also the 2015 time January through May.

5 Q. And what is that number, the total time?

6 A. 5,244 hours.

7 MS. MERMELSTEIN: Can we look at Government Exhibit
8 133 for a moment.

9 Q. So directing your attention to the top, this indicates
10 "2016 KPMG Planning August 2015 to May of 2016."

11 If we can again scroll all the way to the bottom of
12 the exhibit.

13 How many hours in yellow were scheduled total for the
14 planning for this time period?

15 A. 4,707.

16 Q. If we can go to Government Exhibit 134.

17 For 2017, August 2016 through May 2017 -- if we can
18 scroll to the bottom -- what is the total number of planning
19 hours billed during that time period?

20 A. 6,168 hours.

21 Q. Ms. Edwards, aside from the subjects we've covered just
22 now, have you had any involvement in this case?

23 A. No.

24 Q. Do you know anything about the nature of the charges?

25 A. No.

J2rdmid5

Edwards - cross

1 Q. And other than the documents I have just shown you, were
2 you asked to review any other documents or pull any other data
3 for this trial?

4 A. No.

5 MS. MERMELSTEIN: Nothing further, your Honor.

6 THE COURT: OK. Cross. Who would like to go first?
7 Ms. Lester?

8 MS. LESTER: Yes, your Honor.

9 CROSS-EXAMINATION

10 BY MS. LESTER:

11 Q. Hello, Ms. Edwards. My name is Amy Lester and I represent
12 David Middendorf.

13 You testified that your job -- a part of your job is
14 to take information that you receive from the inspection team
15 Scheduling Champion -- I believe you used that term?

16 A. Yes.

17 Q. -- and input that information about people's schedule, that
18 is, members of the inspection team, into StaffTrack, right?

19 A. Yes.

20 Q. And so when you receive that information, that's in advance
21 of the time actually spent by those individuals doing whatever
22 it is that they're scheduled to do?

23 A. Planned hours, yes.

24 Q. Right. So it is a plan of what they intend to do, correct?

25 A. Yes.

J2rdmid5

Edwards - cross

1 Q. It doesn't reflect what they actually did, right?

2 A. Yes. I don't have any knowledge of what they actually did.

3 Q. And it is not updated at some later date to reflect how
4 many hours they actually spent versus how many hours were
5 planned, right?

6 A. It can be if the Scheduling Champion comes back to us.

7 Q. But without that, if the Scheduling Champion doesn't come
8 back to you and make a change, it is never updated later on,
9 correct?

10 A. Correct.

11 Q. If we could take a look at Government Exhibit 132, in
12 evidence, which you were just looking at a moment ago.

13 Up at the top, it says "August 2014 to
14 December 2014 -- I'm sorry, not right at the top but that part.
15 Do you see that in line 3 of the Excel?

16 A. Yes.

17 Q. Is that actually the time period during which planning
18 takes place, if you know?

19 A. I don't know.

20 Q. If we can look at the second tab on the Excel spreadsheet
21 of 14 Schedule. And if we could scroll across, please, to the
22 date range.

23 Do you see it starts in Column U with "Week of
24 7/28/14?"

25 A. Mm-hmm.

J2rdmid5

Edwards - cross

1 Q. And that's blank, correct?

2 A. Yes.

3 Q. And then if we scroll ahead further to the right, there are
4 no entries until you get to the Column AE, which is the week of
5 October 6, '14, right?

6 A. Yes.

7 Q. So is it fair to -- and the relationship between this
8 schedule that we're looking at right now, which is a different
9 tab of the Excel spreadsheet, and the first tab that we looked
10 at is that the first tab summarizes the information that's on
11 this other tab, is that right?

12 A. Yes.

13 Q. So when turning back to the first tab, when it says August
14 to December 2014, it reflects hours within that period but not
15 every week within that period. August to December 2014 may
16 have actually had hours in the spreadsheet, correct?

17 A. Can you repeat that?

18 Q. Yes. It was confusing. Sorry.

19 So we just looked that there were several blank
20 columns, and the first entry was actually for October 2014,
21 right? October 6th? We can look back or you can look at your
22 hardcopy. Column AE.

23 And all the prior columns to the left are blank,
24 right?

25 You can scroll back.

J2rdmid5

Edwards - cross

1 So that means that even though on tab 1 it says August
2 to December, there weren't actually any hours planned until
3 October, right?

4 A. For KPMG.

5 Q. There weren't any hours scheduled during that prior period?

6 A. For that specific assignment code and job code.

7 Q. OK. And if we can look at the third tab of the 15 Schedule
8 and also scroll to the left. If we could stop there.

9 So we see that starting in the -- in column AG, where
10 it says "Week of March 30, 2015," you see it is empty, and then
11 if we keep scrolling to the left there are no more entries?

12 A. Yes.

13 Q. So going back to the first tab, again, on the bottom half
14 of that page, it says "January to May 2015" at the top?

15 A. Mm-hmm.

16 Q. But you would agree with me that the tab that we just
17 looked at doesn't include time passed I believe it was
18 March 30, 2015, right?

19 A. Can we go back to the --

20 Q. Yes, the third tab.

21 Starting in the week of March 30th, there is no
22 entries, correct?

23 A. There are no entries for KPMG 15 Planning.

24 Q. OK. So is it fair to say that in the first tab, the months
25 listed at the top of each entry, that is in this instance

J2rdmid5

Edwards - cross

1 January to May 2015, and above, August to December 2014,
2 doesn't necessarily mean that there was work scheduled during
3 each of those months, correct?

4 A. I don't know.

5 Q. Well, you'll agree with me that this tab that we're looking
6 at now is a summary of the two Excel spreadsheets, right?

7 A. Yes.

8 Q. And we saw periods of time in which no hours were scheduled
9 out, right?

10 A. For that job code, no, combination.

11 Q. So when this summary says January to May, it is not -- it
12 doesn't necessarily mean that hours were scheduled in each of
13 those months, correct?

14 A. The schedule wouldn't be blank so there are hours
15 scheduled. They just may not be to this particular job code
16 and assignment.

17 Q. Understood. But this page that we're looking at now, the
18 first tab includes the job code planning, correct?

19 A. Yes.

20 Q. So there are no hours scheduled under the planning job code
21 for KPMG in, for example, May of 2015, correct?

22 A. Yes.

23 Q. OK. So this date description is just overinclusive is what
24 I'm getting at?

25 A. Yes.

J2rdmid5

Edwards - cross

1 Q. OK. In the normal course, are the StaffTrack spreadsheets
2 that we're looking at maintained for a certain period of time
3 and then deleted or written over, or are they maintained
4 indefinitely?

5 A. Maintained indefinitely.

6 Q. But, again, you never revisit the schedule absent some
7 specific direction from the Scheduling Champion, correct?

8 A. No.

9 MS. LESTER: No further questions, your Honor.

10 THE COURT: All right.

11 Mr. Ohta.

12 MR. OHTA: Thank you, your Honor.

13 CROSS-EXAMINATION

14 BY MR. OHTA:

15 Q. Good afternoon, Ms. Edwards. My name is Jason Ohta and I
16 represent Jeff Wada.

17 Building upon the topic that Ms. Lester was talking
18 about, in StaffTrack, is it just current information for the
19 particular year is in StaffTrack?

20 A. Yes.

21 Q. So for historical information, for example, in 2015, where
22 would that information be housed in?

23 A. We run reports as of the as-of date, so we have historical
24 data for all of this time, all historical data.

25 Q. Is that historical data actually located in StaffTrack or

J2rdmid5

Edwards - cross

1 is it located in another system or --

2 A. So based on the as-of date, it is in StaffTrack, but say
3 the next day that I've made some changes, then if you run the
4 report the next day the data will change.

5 Q. So for this case, when you were asked to run the
6 information for 2015, for example --

7 A. Mm-hmm.

8 Q. -- how did you do that?

9 A. I used the last report of the year.

10 Q. Which is what date?

11 A. 12/31.

12 Q. So you input 12/21/2015 into StaffTrack?

13 A. No. We run reports constantly and date them the date that
14 we run the report.

15 Q. Sure.

16 A. The as-of date.

17 Q. All I'm trying to figure out is is it in StaffTrack or
18 somewhere else?

19 A. Is the data in StaffTrack?

20 Q. Yes.

21 A. Yes.

22 Q. Thank you.

23 MR. OHTA: Ms. O'Connor, can we please turn to
24 Government Exhibits 133, please. That is in evidence.

25 Can we turn to the second tab, please.

J2rdmid5

Edwards - cross

1 Ms. O'Connor, can you please scroll up on the
2 right-hand side? I think we are missing one row. I'm sorry,
3 the other way. Thank you.

4 Q. So, Ms. Edwards, I'm going to just look at the first four
5 lines of this spreadsheet. And just under "Assignments, where
6 it stays "KPMG-15" or "KPMG-16," I'm assuming that's the year,
7 but can you explain what the difference between KPMG-15 and
8 KPMG-16 is under "Assignment"?

9 A. I'm not sure.

10 Q. And I believe you also testified that the hours --

11 Ms. O'Connor, can you scroll to the right? Thank you.

12 And go to the week of February 29, 2016. It would be
13 in column 9.

14 Sorry. Is this Government's Exhibit 133?

15 (Pause)

16 Yes. Thank you very much. And row 9.

17 Q. So, Ms. Edwards, I'm just going to take this one example.

18 So you are getting the hours from the Scheduling
19 Champion, correct?

20 A. Yes.

21 Q. And the Scheduling Champion, there is one for each firm.

22 For example, there is a Scheduling Champion for KPMG, right?

23 A. Right.

24 Q. Perfect. And then looking down, so the Scheduling Champion
25 for KPMG tells you that for Christopher Schaefer and Yoomi So,

J2rdmid5

Edwards - cross

1 so those two individuals for the week of February 29, 2016 will
2 be working 16 hours -- sorry, are scheduled for 16 hours for
3 planning, correct?

4 A. Yes.

5 Q. So for Ms. -- so for Yoomi So, if, for example, Yoomi So
6 was on a -- was scheduled for an annual inspections training in
7 Washington, D.C. --

8 A. Yes.

9 Q. -- on March 2nd through the 4th -- that's Monday,
10 Tuesday -- or that would be Wednesday, Thursday, Friday, of
11 course you can't -- the scheduler wouldn't put planning on
12 there because that person is at an annual inspections training,
13 correct?

14 A. Right.

15 Q. I'll represent that Ms. Yoomi So lives in Los Angeles so --

16 MS. MERMELSTEIN: Objection to defense counsel
17 representing something.

18 THE COURT: Sustained.

19 BY MR. OHTA:

20 Q. Do you know where Ms. Yoomi So works?

21 A. I don't know.

22 Q. Do you know, for traveling purpose, is there a traveling
23 job code that you could put down in a spreadsheet like this?

24 A. No.

25 Q. So if someone were to travel for the entire day, you would

J2rdmid5

Edwards - cross

1 never get that job code?

2 A. We don't track travel in StaffTrack.

3 Q. So if someone were traveling, you would never know?

4 A. Correct.

5 Q. That information would never be populated in a spreadsheet
6 like this?

7 A. No. We don't track travel in StaffTrack.

8 Q. What other things do you track in StaffTrack?

9 A. There are other activities such as field work, home office,
10 training meetings, things like that.

11 Q. Again, the scheduler says this person is planning for two
12 days, you take that as accurate?

13 A. Yes.

14 Q. But if they were traveling for that particular day, you
15 would never know?

16 A. No, we don't track travel.

17 Q. Thus, if you were traveling on a day where it was scheduled
18 for planning, you would agree that they wouldn't be working
19 that day on planning, correct?

20 A. I can't speak on that.

21 Q. I think you mentioned four -- or do you know actually how
22 many job codes there are that you could input into a
23 spreadsheet like this?

24 A. There is no limit, so I don't know the number.

25 Q. Which ones -- but you just testified to the ones you are

J2rdmid5

Edwards - cross

1 familiar with?

2 A. It was just an example of them, yes.

3 Q. Do you have any other examples that you can recall right
4 now?

5 A. Training, home office, not applicable. There are so many I
6 can't think of off the top of my head.

7 Q. Usually when the Scheduling Champion gives you the
8 assignment in the job code, is it ever switched on Monday --
9 or, sorry, is there a mix, for example, field work for four
10 hours, planning for four hours?

11 A. Not that particular combination but you can have two
12 activities in one day.

13 Q. Is it a rare thing to see?

14 A. For that particular combination or just split for the day?

15 Q. Split for the day.

16 A. No, it is not rare.

17 Q. How about for planning?

18 A. I don't know.

19 Q. Do you normally see planning split up in four-hour
20 increments?

21 A. I can't say I normally see it. It can happen. I don't
22 know if it is normal.

23 Q. Based on your experience and in working at PCAOB, how often
24 do you see something like that?

25 A. I don't know.

J2rdmid5

1 Q. I would say not often because I'm looking at the planning
2 spreadsheet and it looks like you can divide the majority of
3 the numbers by 8.

4 MS. MERMELSTEIN: Objection to counsel's commentary on
5 what the document says.

6 THE COURT: Sustained.

7 BY MR. OHTA:

8 Q. When would -- withdrawn.

9 My last question, Ms. Edwards.

10 I think you testified that sometimes the Scheduling
11 Champion comes back and corrects the schedule?

12 A. They'll update it.

13 Q. Do they ever update planning hours, in your recollection?

14 A. I don't know.

15 Q. Do you recall that ever happening to you?

16 A. I can't -- I don't know. I don't remember.

17 MR. OHTA: Thank you.

18 No further questions, your Honor.

19 THE COURT: OK. Thank you.

20 Anything further?

21 MS. MERMELSTEIN: No. Thank you, your Honor.

22 THE COURT: OK. Thank you. You may step down.

23 (Witness excused)

24 THE COURT: Government, you may call your next
25 witness.

J2rdmid5

Lee - direct

1 MS. MERMELSTEIN: The government calls Antoine Lee,
2 your Honor.

3 And if I could just leave the documents for the
4 witness?

5 THE COURT: Yes.

6 Please come on up to the witness chair and you can be
7 seated in the chair.

8 And if you would please raise your right hand, you
9 will be sworn in.

10 ANTOINE LEE,

11 called as a witness by the government,

12 having been duly sworn, testified as follows:

13 THE CLERK: Please state your full name and spell your
14 first and last name slowly for the record.

15 THE WITNESS: Antoine Lee. My first name
16 A-n-t-o-i-n-e; last name Lee, L-e-e.

17 THE CLERK: Thank you.

18 THE COURT: You said L-e-e?

19 THE WITNESS: Yes.

20 THE COURT: If you would speak into the mic, please.
21 Thanks.

22 DIRECT EXAMINATION

23 BY MS. MERMELSTEIN:

24 Q. Mr. Lee, can I ask you to state your name again for the
25 jury?

J2rdmid5

Lee - direct

1 A. Certainly. Antoine Lee.

2 Q. Mr. Lee, good afternoon.

3 Where are you employed?

4 A. The PCAOB.

5 Q. And how long have you been employed at the PCAOB?

6 A. Since July 7th of 2014.

7 Q. What is your current title?

8 A. Senior employee relations and compliance specialist.

9 Q. As a senior employee relations and compliance specialist

10 with the PCAOB, are you familiar with the way in which the

11 PCAOB maintains compensation information?

12 A. Yes.

13 Q. How do they do that?

14 A. We maintain our compensation information out of the -- our
15 UltiPro System.

16 Q. What is UltiPro?

17 A. So UltiPro is a product of Ultimate Software. Ultimate
18 Software, they provide a cloud-based human capital management
19 system, and within that system there are various components,
20 one component being a payroll component, another being our
21 timekeeping component, and other benefits of components.

22 Q. Kind of an HR database?

23 A. That is correct.

24 Q. Is the information in the UltiPro system created, kept, and
25 maintained in the ordinary course of the PCAOB's business?

J2rdmid5

Lee - direct

1 A. Yes.

2 Q. Is the information created or input by persons with
3 knowledge of, or created from information transmitted by
4 persons with knowledge of, the information shown?

5 A. Yes.

6 Q. Is the information created at or near the time the
7 information becomes available?

8 A. Yes.

9 Q. I want to direct your attention to Government Exhibit 131A,
10 for identification.

11 I am going to pull it up on the screen for you, but a
12 full hard copy is in that binder that is sitting on the ledge
13 there.

14 Do you recognize governments Exhibit 131A?

15 A. I do.

16 Q. What is it?

17 A. This is a compensation record -- compensation summary,
18 rather, that is housed within the UltiPro System.

19 Q. Did you pull this compensation summary record from the
20 UltiPro System?

21 A. Yes.

22 Q. Do these records truly and accurately reflect the
23 compensation information for the employees listed?

24 A. Yes.

25 Q. And does Government Exhibit 131A contain compensation

J2rdmid5

Lee - direct

1 information for all PCAOB employees or just for the ones who
2 are listed in this document?

3 A. Just the ones that are listed.

4 MS. MERMELSTEIN: The government offers Government
5 Exhibit 131 -- excuse me, 131A, your Honor. Thank you.

6 MS. LESTER: The same objection, your Honor.

7 MR. OHTA: The same objection, your Honor.

8 THE COURT: The objections are noted and overruled,
9 and the document is received, 131A.

10 (Government's Exhibit 131A received in evidence)

11 MS. MERMELSTEIN: Thank you.

12 Ms. Urbanczyk, can we go to the third employee, which
13 I think is probably page 6 of this document. There we go.
14 Perfect. Thank you.

15 BY MS. MERMELSTEIN:

16 Q. Mr. Lee, can you explain just as an example looking at this
17 what we are looking at here?

18 A. Certainly. So what's listed here is Blayne's current
19 salary, which is broken out on an annual pay period, weekly,
20 and hourly breakdown.

21 There is a job detail, which provides his job title,
22 his exemption status, salary versus hourly. It looks like he
23 is a salaried exempt from overtime employee. Yes, and there
24 should be a history, too.

25 Q. Let's go to the second page.

J2rdmid5

Lee - cross

1 What were we looking at now?

2 A. So this is a history of what his salary has been going back
3 to 2014.

4 Q. Aside from the subjects I've just asked you about, have you
5 had any involvement in this case?

6 A. No.

7 Q. And other than the document I just showed you that you
8 pulled from the UltiPro System, have you been asked to review
9 or pull any other documentation in this case?

10 A. No.

11 MS. MERMELSTEIN: Nothing further, your Honor.

12 THE COURT: All right.

13 Ms. Lester.

14 MS. LESTER: Thank you, your Honor.

15 CROSS-EXAMINATION

16 BY MS. LESTER:

17 Q. Good afternoon, Mr. Lee. My name is Amy Lester and I
18 represent David Middendorf.

19 Looking again, if we could, at Government Exhibit
20 131A, you can just look at the first entry.

21 This format, this two-page format, is this a format
22 that the PCAOB or you use at all in your work, the format in
23 which this report appears?

24 A. I guess I don't understand your question.

25 Q. Well, if we go just to the next page, Ms. O'Connor.

J2rdmid5

Lee - cross

1 This two-page document for this particular employee,
2 this compensation summary, is this a document that you use in
3 the normal course of your employment at the PCAOB?

4 A. No.

5 Q. Have you ever created this type of compensation summary
6 previously to when you were asked to do it for this case?

7 A. I have had to print these out before, but these on a
8 routine basis, no.

9 Q. Could we look at the date in the upper left-hand corner on
10 the page that says "2/21/2019, Print Preview." Do you see
11 that?

12 A. Yes.

13 Q. And were you the person who prepared this on February 21st
14 of this year?

15 A. Yes.

16 Q. And you printed out these documents or made these documents
17 available in electronic form?

18 A. That's correct.

19 MS. LESTER: And we can take that down. Thanks,
20 Ms. O'Connor.

21 If we could talk for a moment about -- I'm sorry, I
22 didn't need the whole document, just that little portion. If
23 we could look at a different part of the document.

24 Q. In the "Pay Currency," it says, "Pay Currency, Annual,
25 period, weekly, and hourly." Do you see that?

J2rdmid5

Lee - cross

1 A. Yes.

2 Q. The pay period is twice a month, is that right?

3 A. That's right.

4 Q. And the weekly and hourly rates, are those rates that the
5 PCAOB uses in the normal course in determining payroll if
6 employees are paid on a twice-a-month basis?

7 A. I don't understand your question.

8 Q. Do you ever need to calculate someone's hourly wage for any
9 purpose in your job?

10 A. Yes.

11 Q. For what purpose is that?

12 A. So a part of my responsibility is the drafting of
13 separation agreements. So if by chance I'm drafting a
14 separation agreement, I would use the hourly rate to calculate
15 that amount, whatever is --

16 Q. How would the hourly rate be used in connection with a
17 separation agreement?

18 A. So the hourly rate would be calculated by 40, 40 hours in a
19 workweek, and then that 40 hours will be calculated by whatever
20 the determination of the total amount would be of the timeframe
21 that we're offering the person.

22 Q. Are you saying that if, for instance, someone left not at
23 the end -- left the PCAOB not at the end of a pay period, you
24 would need to calculation how many additional hours the person
25 had worked so that you could figure out their payroll for that

J2rdmid5

Lee - cross

1 period?

2 A. No.

3 Q. OK. I'm not understanding the significance of what you're
4 saying, then, in connection with the separation agreement.

5 A. Right. So with the separation agreement, if by chance we
6 say, you know, you will be paid two weeks your salary, what I
7 would do, it would be to take the hourly rate, the \$69. I
8 would multiply that by 40 hours in the week. And then I would
9 multiply the 40 hours by two -- or I would multiply it by 80
10 hours for two weeks to come out with what the amount would be
11 for that two-week period. So I could take that weekly rate and
12 calculate that by two to get that amount, or I can take the
13 hourly rate and do the same thing.

14 Q. And is it fair to say that for a salaried employee, you're
15 always relying on the assumption of an eight-hour workday or a
16 40-hour workweek, is that correct?

17 A. Yes.

18 Q. And I don't know if you have had a chance to flip through
19 every single page of 131A, but you testified that you were
20 involved in preparing it.

21 So isn't it a fact, sir, that all of the employees
22 listed here are salaried employees?

23 You can flip through, if you would like, the hardcopy.

24 A. Let me take a look.

25 Q. Sure.

J2rdmid5

Lee - cross

1 (Pause)

2 A. Yes, that's correct.

3 Q. And you testified, I believe on direct, that salaried
4 employees are exempt from any overtime pay, is that right?

5 A. That's right.

6 Q. So regardless of how many hours they work in a week, for
7 example, if they have a sick day, they still get paid their
8 regular salaried rate for that week, correct?

9 A. Correct.

10 MS. LESTER: No further questions.

11 THE COURT: OK. Mr. Ohta.

12 MR. OHTA: Thank you, your Honor.

13 CROSS-EXAMINATION

14 BY MR. OHTA:

15 Q. Good afternoon, Mr. Lee. My name is Jason Ohta and I
16 represent Jeff Wada.

17 A. Good afternoon.

18 Q. The UltiPro System, when was that implemented?

19 A. The UltiPro System was implemented in 2014.

20 MR. OHTA: No further questions, your Honor.

21 THE COURT: OK. Anything further?

22 MS. MERMELSTEIN: No, your Honor.

23 THE COURT: All right. Thank you, sir. You may step
24 down.

25 THE WITNESS: Thank you.

J2rdmid5

Koch - direct

1 (Witness excused)

2 THE COURT: The government may call its next witness.

3 MS. ESTES: Your Honor, the government calls Kenneth
4 Koch.

5 (Pause)

6 THE COURT: Sir, if you would please come on up to the
7 witness stand and be seated in the witness chair.

8 And if you would please raise your right hand, you
9 will be sworn in.

10 Kenneth CHARLES KOCH,

11 called as a witness by the government,

12 having been duly sworn, testified as follows:

13 THE CLERK: Please state your full name and spell your
14 last name slowly for the record.

15 THE WITNESS: Kenneth Charles Koch, K-o-c-h.

16 THE CLERK: Thank you.

17 DIRECT EXAMINATION

18 BY MS. ESTES:

19 Q. Good afternoon.

20 A. Hello.

21 Q. Where do you currently work?

22 A. KPMG.

23 Q. How long have you worked for KPMG?

24 A. 16 years.

25 Q. Before you were at KPMG, where did you work?

J2rdmid5

Koch - direct

1 A. I was active duty in the Air Force for ten years.

2 Q. What did you do in the Air Force?

3 A. I started out in Crypto Electronics and Telecommunications,
4 and then I was recruited into the Air Force Office of Special
5 Investigations.

6 Q. After you left the Air Force, when you first started at
7 KPMG, what did you do?

8 A. I was a manager in the forensics practice.

9 Q. What is the forensics practice?

10 A. Forensics practice is a part of our advisory practice that
11 we go out and conduct corporate fraud investigations and
12 computer forensics for government investigations and other
13 litigation.

14 Q. What is your current role at KPMG?

15 A. I'm a principal in the Atlanta office.

16 Q. By "a principal," do you mean partner?

17 A. Yes, partner without a CPA.

18 Q. Are you in a particular group?

19 A. I am. I am still in the forensic practice.

20 Q. And what are your duties and responsibilities as a
21 principal in the forensic practice?

22 A. I lead the Southeast U.S. for all things forensic,
23 technology. So that includes computer forensics and electronic
24 discovery and data analytics, and I oversee all of our people
25 in that area and have client responsibilities for engagements

J2rdmid5

Koch - direct

1 where we deliver our services and then also for business
2 development.

3 Q. And in your role as a principal in the forensics practice,
4 do you also sometimes serve as a records custodian for KPMG?

5 A. I do.

6 Q. And what does it mean to be a records custodian?

7 A. It means that I authenticate the records that are our
8 business records at the firm.

9 Q. Mr. Koch, I am now going to hand you a CD that contains
10 Government Exhibits 700 through 702, 750 through 759, 800
11 through 825, 875 through 876, 925 through 956, 1000 through
12 1017, 1050 through 1078, and 1124 through 1144.

13 Mr. Koch, do you recognize this CD?

14 A. I do.

15 Q. And generally speaking, what is contained on this CD?

16 A. On this CD are 144 exhibits that are emails and other types
17 of documents and correspondence from KPMG.

18 Q. Did KPMG produce these emails and other types of
19 correspondence to the government?

20 A. Yes.

21 Q. How do you know that?

22 A. I know that because I inspected the CD and inspected the
23 Bates numbers on the documents themselves.

24 Q. And what is a Bates number?

25 A. A Bates number is a unique identifier for a document.

J2rdmid5

Koch - direct

1 Q. Now, Mr. Koch, stepping back a bit: How does KPMG store
2 emails?

3 A. We store emails on a variety, a number of email servers
4 that are located in Montvale, New Jersey, in our data center.

5 Q. What is an email server?

6 A. An email server is a computer server that acts as the
7 manager for organizing the sending and receiving and storage of
8 email and in a variety of individual user mailboxes and group
9 mailboxes, etc.

10 Q. And does KPMG have one server or more than one?

11 A. We have multiple servers.

12 Q. And I believe you said they were located in Montvale, New
13 Jersey?

14 A. Yes, that's correct.

15 Q. How long have they been located in Montvale, New Jersey?

16 A. At least for the past ten years. I believe we moved
17 everything to Montvale in 2005.

18 Q. Do emails sent from a KPMG email address have to travel
19 through the server?

20 A. That's correct.

21 Q. So to be clear, emails sent in 2015, 2016 and 2017 from a
22 KPMG email account, would they have traveled through the
23 servers in New Jersey?

24 A. Yes.

25 Q. So even if someone in KPMG's New York office emails someone

J2rdmid5

Koch - direct

1 else in KPMG's New York office, does that email still travel
2 through New Jersey?

3 A. Yes.

4 MS. ESTES: Mr. Urbanczyk, can you pull up what's been
5 marked for identification as Government Exhibit 1144?

6 Q. Mr. Koch, do you recognize this exhibit?

7 A. I do.

8 Q. And what's the date of the emails here?

9 A. It was sent on February 15, 2017.

10 Q. And who are the parties to the emails?

11 A. It was sent from David Middendorf to Mark Rubino.

12 MS. ESTES: Your Honor, the government offers
13 Government Exhibit 1144.

14 THE COURT: Received.

15 (Government's Exhibit 1144 received in evidence)

16 MS. ESTES: Now, Mr. Urbanczyk, can you zoom in on the
17 second email from the top.

18 Q. Mr. Koch, who is this email from?

19 A. It's from Mark Rubino.

20 Q. And looking at the signature block there, what is his title
21 at KPMG?

22 A. Principal and Associate General Counsel.

23 Q. And who is this email to?

24 A. This email is to David Middendorf.

25 Q. Can you read the email?

J2rdmid5

Koch - direct

1 A. It says: "Dave, when you have a chance, can you email me
2 the list you generated from your call on 2/6? Thanks. Mark."

3 MS. ESTES: Mr. Urbanczyk, can you zoom out of that
4 and zoom into the top email.

5 Q. Mr. Koch, who is this one from?

6 A. This is from David Middendorf.

7 Q. And what does the email say?

8 A. It says, "See attached." And it has a list.docx attached.

9 MS. ESTES: Mr. Urbanczyk, can you go to the third
10 page of this document.

11 Q. Is this the attachment, Mr. Koch?

12 A. Yes, it is.

13 Q. What is the title at the top?

14 A. The title is "List."

15 MS. ESTES: And if you could, Mr. Urbanczyk, if you
16 could zoom back in just for a minute.

17 Q. Mr. Koch, can you just read the first five names on the
18 list?

19 A. AH Belo Corp, Applied Materials, Bank United, Bio Rad Labs
20 and BMO.

21 MS. ESTES: Mr. Urbanczyk, can you zoom out.

22 Q. How many entries are on this list, Mr. Koch?

23 A. There are 47.

24 MS. ESTES: Thank you, Mr. Urbanczyk. You can take
25 that down.

J2rdmid5

Koch - direct

1 And if you could pull up what's been marked for
2 identification as Government Exhibit 1124.

3 Q. Mr. Koch, do you recognize this document?

4 A. I do.

5 Q. And what is this?

6 A. This is a meeting request.

7 Q. Who is it from?

8 A. It is from Brian Sweet.

9 Q. And what is the date listed there?

10 A. February 3, 2017.

11 MS. ESTES: Your Honor, the government offers
12 Government Exhibit 1124.

13 THE COURT: Received.

14 (Government's Exhibit 1124 received in evidence)

15 BY MS. ESTES:

16 Q. Mr. Koch, looking at this document, what is the date next
17 to the "Sent" line?

18 A. It's February 3, 2017.

19 Q. And what is the time there?

20 A. 8:03 in the evening.

21 Q. Based on your experience at KPMG's forensics practice and
22 your work as a records custodian, what is your understanding of
23 what time zone this is in?

24 A. That time zone is in UTC.

25 Q. And who is this calendar invite to?

J2rdmid5

Koch - direct

1 A. Let's see. It's Brian Sweet, Thomas Whittle and David
2 Middendorf.

3 Q. What is the subject line?

4 A. "Catch-up meeting."

5 Q. And what is the conference call number listed there?

6 A. 888-921-7713, with the passcode of 8475012.

7 Q. And what is the start time listed there?

8 A. The start time is February 7th at 1:30 a.m.

9 Q. And what is your understanding of what time zone this
10 reflects?

11 A. That my understanding would be whatever the local time zone
12 is on the person's computer. So if they're local to New York
13 and have a New York time set on their computer, that's what
14 time it will be.

15 Q. And, Mr. Koch, generally speaking, is it common for emails
16 produced by KPMG to reflect UTC Time at the top of the email?

17 A. Yes.

18 Q. Now, switching gears.

19 MS. ESTES: Mr. Urbanczyk, you can take that down.

20 Q. Are you familiar with KPMG's eAudIT system?

21 A. I am.

22 Q. What is that?

23 A. KPMG's eAudIT system is essentially our electronic
24 workpapers for our audit engagements.

25 Q. Is this system commercially available or is it

J2rdmid5

Koch - direct

1 KPMG-specific?

2 A. No, it is KPMG custom built.

3 Q. What sort of records are maintained on the eAudIT system?

4 A. All of the workflow items as part of the audit engagement
5 for the delivery of the audit engagement so the decisions that
6 are made and the actions that are taken, and there are forms
7 that you fill out within the eAudIT system. And you can also
8 attach supporting files, so like documents and Excel files and
9 things like that and supporting documentation.

10 Q. Now, if there is an eAudIT file of a particular engagement,
11 can anybody access it or is the access limited in some way?

12 A. No, the access is limited. The engagement partner and
13 engagement senior manager will provide access to the team
14 members that they designate need access to it, and those are
15 the only people who will have access.

16 Q. Mr. Koch, are you generally familiar with the 45-day
17 documentation period in connection with an audit?

18 A. I am.

19 Q. Now, with respect to the eAudIT system, what happens after
20 that 45-day documentation period closes?

21 A. It goes through a technical closeout where it creates an
22 "ret" file for our retention, and it locks down the file so
23 that it can't be changed.

24 Q. Now, during the documentation period, does the KPMG eAudIT
25 system have a way of tracking the changes that are made to

J2rdmid5

Koch - direct

1 workpapers during that period?

2 A. No, it doesn't.

3 Q. And once the papers are closed, is there any way to go back
4 and see what they looked like, say, on day 20 of the
5 documentation period?

6 A. No.

7 Q. Now, Mr. Koch, switching gears again.

8 What office do you work out of again?

9 A. In the Atlanta office.

10 Q. Do you ever work out of a different office at KPMG?

11 A. I do. I travel quite a bit, so I'm in various offices
12 often.

13 Q. Does KPMG have a term for working out of a different
14 office?

15 A. We do. So if you show up at a different office, you will
16 hotel. So it's called the hoteling system and so you'll use
17 that to get an available office and a place to sit.

18 MS. ESTES: Mr. Urbanczyk, can you pull up what's been
19 marked for identification as Government Exhibit 953.

20 Q. Mr. Koch, do you recognize this?

21 A. I do.

22 Q. And what are the date of these emails?

23 A. The date is March 28, 2016.

24 Q. And who are the parties to the emails?

25 A. It's from Cindy Holder to Michael Flynn.

J2rdmid5

Koch - direct

1 MS. ESTES: Your Honor, the government offers
2 Government Exhibit 953.

3 THE COURT: Received.

4 (Government's Exhibit 953 received in evidence)

5 BY MS. ESTES:

6 Q. Now, Mr. Koch, going to the bottom email there, who is the
7 bottom email from?

8 A. From Cindy Holder.

9 Q. And what does the bottom email say?

10 A. It says: "Mike, do you have time for a quick chat?
11 Cindy."

12 Q. Who is the middle email from?

13 A. It is from Michael Flynn.

14 Q. What does it say?

15 A. It says: "I am in a meeting currently. Will call when
16 available."

17 Q. Who is the top email from?

18 A. It is from Cindy Holder.

19 Q. And what does the top email say?

20 A. "Great. Thanks. 212-954-2251."

21 Q. And turning to this top email here, do you have an
22 understanding of what time zone this top email is in?

23 A. The top email would be in UTC.

24 MS. ESTES: Thank you, Mr. Urbanczyk. You can take
25 that down.

J2rdmid5

Koch - direct

1 And if you could pull up what's been marked for
2 identification as Government Exhibit 1309.

3 Q. Mr. Koch, do you recognize this?

4 A. Yes.

5 Q. And what are we looking at here?

6 A. This is a screenshot from our telephone systems that is
7 part of the telephone system database.

8 Q. And is the telephone system database kept in the regular
9 course of KPMG's business?

10 A. Yes, it is.

11 Q. And are the records in this database made by KPMG employees
12 who have personal knowledge of who has the phone numbers they
13 belong to?

14 A. Yes.

15 Q. And are the records generally updated as phone numbers
16 change at KPMG?

17 A. Yes.

18 MS. ESTES: Your Honor, the government offers
19 Government Exhibit 1309.

20 THE COURT: 1309 is received.

21 (Government's Exhibit 1309 received in evidence)

22 MS. ESTES: Mr. Urbanczyk, can you zoom into the top
23 portion of the document.

24 Q. Mr. Koch, looking at this screenshot here, what does
25 "directory number" refer to?

J2rdmid5

Koch - direct

1 A. Directory number refers to the telephone number.

2 Q. And what does the description there referred to?

3 A. "NYO," that description refers to the office.

4 Q. And where it says "Guest 030," what does that refer to?

5 A. That means that it is part of a guest pool, so a pool of
6 numbers that can be used by visiting guests.

7 Q. Is that visiting people from other offices?

8 A. Yes.

9 MS. ESTES: And Mr. Urbanczyk --

10 THE COURT: Ms. Estes, I want to do an afternoon break
11 fairly soon. So if you want to do a few more questions or we
12 can break now.

13 MS. ESTES: If we can do just one other thing right
14 now, your Honor, and we will take the break.

15 THE COURT: Sure.

16 MS. ESTES: Actually, Mr. Urbanczyk, can you pull that
17 back up.

18 And, Mr. Urbanczyk, can you pull up Government Exhibit
19 953 side-by-side with this.

20 And if you could zoom into the phone numbers in both
21 of these.

22 BY MS. ESTES:

23 Q. Mr. Koch, looking at these document here, are those the
24 same phone numbers?

25 A. They are.

J2rdmid5

Koch - direct

1 MS. ESTES: All right. Your Honor, this is a good
2 time for a break.

3 THE COURT: OK. Folks, we will take ten minutes.
4 Please leave your pads on your chairs and we'll continue in ten
5 minutes.

6 (Continued on next page)

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J2rdmid5

Koch - direct

1 (Jury not present)

2 THE COURT: You may be seated.

3 You may step down, sir.

4 We will be in recess for ten minutes.

5 MS. ESTES: Thank you.

6 (Recess)

7 MS. ESTES: Should we get the witness back on the
8 stand?

9 THE COURT: Yes, please.

10 (Continued on next page)

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J2rdmid5

Koch - direct

1 (Jury present)

2 THE COURT: Please be seated.

3 OK, folks. We'll go until about 5 today and then
4 tomorrow is Thursday. So, we will actually end tomorrow at 4,
5 and then we won't be sitting on Friday. So your weekend for
6 purposes of jury duty will end tomorrow at 4. All right?

7 JURORS: Thank you.

8 THE COURT: And we'll continuing with the witness.

9 Ms. Estes, you may proceed.

10 (Continued on next page)

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J2rrmid6

Koch - Direct

1 (Jury present)

2 THE COURT: We'll go until about 5:00 today. Tomorrow
3 is Thursday. We will actually end tomorrow at 4:00.

4 MS. ESTES: Mr. Urbanczyk, can you pull up what is in
5 evidence as Government Exhibit 1124. And if you could zoom in
6 to the top.

7 BY MS. ESTES:

8 Q. Mr. Cook, looking back at this exhibit and focusing on the
9 start and end time there, can you read what it says.

10 A. Yes. It says start time February 7, 2017, at 1:30 a.m. and
11 at 2:30 a.m.

12 Q. I believe you testified earlier that this was in the local
13 time zone of the person involved in the email. Did you want to
14 clarify your answer on that?

15 A. Yes. That was a mistake. That whole piece of this is all
16 in UTC.

17 MS. ESTES: Mr. Urbanczyk, can you take that down.
18 And can you pull up what is in evidence as Government Exhibit
19 953 zoom in to the stop email.

20 Q. In this document at the very top email, what is your
21 understanding of what time zone that is in?

22 A. The very top is in UTC.

23 Q. Looking at the middle email there, what is your
24 understanding of what time zone that is in?

25 A. The middle of the email would be whatever the local time of

J2rrmid6

Koch - Direct

1 the computer is.

2 Q. Then what about the bottom email there?

3 A. Same thing. Anything within the body in the thread down
4 below is in the local time for the computer, whatever the time
5 computer was set to.

6 Q. Thank you.

7 MS. ESTES: Mr. Urbanczyk, you take that down.

8 Q. Mr. Cook, is there any security at KPMG regarding entry
9 into KPMG's offices?

10 A. Yes. We have a badge reader access to get into our
11 offices.

12 Q. What do you mean by that?

13 A. An electronic security badge. There is a badge reader on
14 the outside of the door. You place the badge next to it, and
15 it buzzes and lets you in.

16 Q. Do you have to use the badge reader to get into a
17 particular floor?

18 A. In some offices, yes.

19 Q. Does KPMG maintain information to show when an employee
20 swipes in to the office?

21 A. Yes, we do.

22 Q. Is that information kept in the regular course of KPMG's
23 business?

24 A. Yes.

25 Q. Is it made at or around the time of the swipes?

J2rrmid6

Koch - Direct

1 A. Yes, it is.

2 Q. Let me pull up what's been marked for identification as
3 Government Exhibit 1308. Mr. Koch, do you recognize this?

4 A. I do.

5 Q. What are we looking at here?

6 A. This is a report from our badge reader system.

7 Q. Who does this report relate to?

8 A. Cindy Holder.

9 Q. What dates does this report refer to? If we can start from
10 the top.

11 MS. ESTES: Then, Mr. Urbanczyk, if you can scroll to
12 the last page.

13 A. It covers badge entry for essentially the month of March
14 2016.

15 MS. ESTES: Your Honor, the government offers
16 Government Exhibit 1308.

17 THE COURT: Received.

18 (Government's Exhibit 1308 received in evidence)

19 Q. Mr. Koch, what is the title of this document?

20 A. Badge history archive report.

21 Q. Where it says "last name" and "first name," what does that
22 refer to?

23 A. The badge carrier.

24 Q. So this document in particular is for Cindy Holder?

25 A. Correct.

J2rrmid6

Koch - Cross

1 Q. Where it says "reader," what does that column refer to?

2 A. That is the actual security reader device on the outside of
3 the door that you badge into.

4 Q. Where it says, for instance, "345 Park, 18th FL main entry"
5 at the top, what does that refer to?

6 A. That's our office in New York at 345 Park Avenue on the
7 18th floor.

8 MS. ESTES: Mr. Urbanczyk, can you go to the second
9 page of this document. If you could zoom in to the two entries
10 for March 28, 2016.

11 Q. Mr. Cook, what does it say in the reader column there for
12 this day?

13 A. It's the 345 Park office on the 22nd floor.

14 Q. That's the New York office?

15 A. Yes.

16 MS. ESTES: No further questions.

17 THE COURT: Ms. Lester.

18 CROSS-EXAMINATION

19 BY MS. LESTER:

20 Q. Good afternoon, Mr. Koch.

21 A. Hello.

22 Q. My name is Amy Lester, and I represent David Middendorf.

23 You testified on direct examination about the eAudit system.

24 Do you remember that?

25 A. Yes.

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Koch - Cross

1 Q. Since the time 2014 through the present, isn't it the case
2 that eAudit has never tracked changes in terms of the audit
3 work papers, correct?

4 A. Yes, that is my understanding.

5 Q. Isn't it also the case that in theory if someone wanted to
6 take a snapshot of the work papers at any particular point in
7 time prior to the date where the work papers are locked down,
8 that could be done in the eAudit system, correct?

9 A. What do you mean by a snapshot?

10 Q. For example, at the lock-down date, that is the date on
11 which the file is closed in the audit; you can't see any track
12 changes, correct?

13 A. Yes.

14 Q. If at some point prior to the lock-down date you wanted to
15 go into the eAudit system and see how the documents appeared on
16 that date, you could take a snapshot, an electronic snapshot,
17 and preserve it as of that date, correct?

18 A. I suppose you could, yes.

19 Q. I'd also like to take a look at what is in evidence as
20 Government Exhibit 1144, which you also looked at in your
21 direct examination. Do you remember reviewing this email?

22 A. Yes.

23 Q. This is an email exchange between Dave Middendorf and Mark
24 Rubino, correct?

25 A. Yes.

J2rrmid6

Koch - Cross

1 Q. Who is Mark Rubino?

2 A. He's a principal in our office of general counsel, an
3 attorney there.

4 Q. Is he based in the New York office?

5 A. Yes.

6 Q. Isn't it the case, sir, that Mr. Rubino was involved in the
7 internal investigation of this matter?

8 MS. ESTES: Objection: outside the scope.

9 THE COURT: Overruled.

10 A. I'm really not aware of his involvement.

11 Q. You have no idea whether he was involved in an internal
12 investigation?

13 MS. ESTES: Objection: asked and answered.

14 THE COURT: Sustained.

15 Q. Are you aware, sir, that KPMG conducted an internal
16 investigation beginning in approximately February 2017?

17 MS. ESTES: Objection: outside the scope.

18 THE COURT: Sustained.

19 Q. Mark Rubino is an associate general counsel, correct?

20 A. Yes.

21 Q. One of the things that the general counsel's office does is
22 conduct internal investigations should those be necessary,
23 correct?

24 MS. ESTES: Objection, your Honor: completely outside
25 the scope.

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Koch - Cross

1 THE COURT: Sustained.

2 MS. LESTER: No further questions.

3 THE COURT: Mr. Cook.

4 CROSS-EXAMINATION

5 BY MR. COOK:

6 Q. Good afternoon, Mr. Koch. My name is Steve Cook. I
7 represent Jeffrey Wada.

8 A. Hello.

9 Q. Sir, do you still have that disc in front of you that you
10 testified about earlier?

11 A. I do.

12 Q. I believe you testified that that disc contains 144
13 exhibits?

14 A. That's correct.

15 Q. Those exhibits consist of emails and other types of
16 documents and correspondence from KPMG?

17 A. Yes.

18 Q. You testified that they were produced to the government by
19 KPMG, is that right?

20 A. Yes.

21 Q. How do you know that?

22 A. It's my understanding by the production Bates numbers that
23 the documents were produced. I have looked at the Bates
24 numbers, and they represent the production.

25 Q. Let's take a look at what you refer to as Bates numbers.

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Koch - Cross

1 MR. COOK: Could we pull up Government Exhibit 1141.
2 If we could zoom in to the bottom right portion of the
3 document.

4 Q. Are these the Bates numbers to which you were referring?
5 A. Yes.

6 Q. You testified that you know that the documents were
7 produced by KPMG to the government because of the Bates
8 numbers, is that correct?

9 A. Yes.

10 Q. Just underneath that yellow government exhibit sticker
11 there is a series of letters and numbers that start with S dash
12 KPMG dash PCAOB, etc.?

13 A. Yes.

14 Q. Does the S dash KPMG indicate to you that that means the
15 document was produced by KPMG to the government?

16 A. Yes.

17 Q. Then at the end of that series of letters there is a series
18 of numbers. Do you see that?

19 A. Yes.

20 Q. Is it your understanding that every page of every exhibit
21 that is contained on that disc would have a sequential number
22 to it?

23 A. Yes.

24 Q. For example, Government Exhibit 1141 that we are looking at
25 here begins with page number 27, is that correct?

J2rrmid6

Koch - Cross

1 A. Yes.

2 MS. ESTES: Your Honor, I believe Government Exhibit
3 1141 is not evidence.

4 MR. COOK: Your Honor, I am only going to refer to
5 Bates number.

6 THE COURT: So it has not been admitted in evidence.

7 MR. COOK: Your Honor, I do not intend to show the
8 substance of the document. I don't have the documents that are
9 on the disc in front of me. I just want to demonstrate what
10 the Bates numbering system looks like and that's all.

11 THE COURT: Okay.

12 Q. Mr. Koch, is it true that this scheme, Bates numbering
13 system, is the same that is used on all of the documents on
14 that disc in front of you? In other words, KPMG-PCAOB and then
15 a series of numbers that represent page numbers?

16 A. I believe so, yes.

17 MR. COOK: We can take this down.

18 Q. Let's take a look at what's been marked for identification
19 as Defendant's Exhibit 1463. It's a large exhibit, sir, so I'm
20 going to hand you a hardcopy as well for you to refer to.

21 MR. COOK: May I approach, your Honor?

22 THE COURT: Yes.

23 MS. ESTES: Your Honor, may we approach?

24 THE COURT: Yes.

25 (Continued on next page)

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Koch - Cross

1 (At the sidebar)

2 MS. KRAMER: Your Honor, we object to the use of this
3 exhibit and believe that defense counsel lacks a good faith
4 basis for showing it to this witness. We understand and have
5 relayed to defense counsel that KPMG counsel prepared this
6 document after the government requested a phone list of some
7 sort, that this is not a regular business record of KPMG.

8 It was prepared in connection with an investigation
9 and drawn from a number of other documents. We relayed that to
10 defense counsel and. They have no good faith basis to offer
11 this as a business record of KPMG, and we object it being shown
12 to this witness.

13 MR. COOK: Your Honor, I listened very carefully to
14 the business record foundation laid by Ms. Estes to this
15 witness to get in the documents that they got in and that
16 consisted of the Bates numbering scheme consisting of "KPMG,"
17 and that's about it. That's all he had personal knowledge of.
18 Bates numbering, "KPMG" on it, that's how he knew they were
19 produced to the government. On that basis these documents were
20 admitted.

21 THE COURT: No, I don't think so.

22 MS. ESTES: They were not admitted. These were mostly
23 already in evidence. That was just to establish that these
24 emails were connected to the server. We didn't admit any of
25 those emails on that disc through him. We admitted three

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Koch - Cross

1 emails that he recognized. We listed the names. And those
2 were admissible not as business records but because they were,
3 for example, an email from David Middendorf or a calendar
4 invite directly related to the facts of the case.

5 MR. COOK: I appreciate that clarification. I do not
6 intend to introduce this document into evidence through this
7 witness, only to have him identify the Bates labeling scheme
8 that is used on it, and we will tie it up later and introduce
9 it through another witness.

10 MS. KRAMER: There is no relevance, your Honor. The
11 fact that something was stamped with a Bates number for
12 production to the government in this case has no bearing under
13 the rules of evidence.

14 THE COURT: I don't know how the Bates number is
15 relevant to anything.

16 MR. COOK: That was his testimony for the reason why
17 he got documents indicated on that disc.

18 THE COURT: No, that wasn't the basis for the
19 admission of any document.

20 MR. WEDDLE: Your Honor, the entire point of his
21 testimony was that he said that he testifies as a business
22 records custodian for KPMG, and he said based on his review of
23 the disc and of the Bates numbers he could tell what those
24 exhibits were.

25 We can pull up the live feed and see exactly what he

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Koch - Cross

1 said, but I looked at it very carefully when he said it, and he
2 in fact concluded from his review of Bates numbers two things:
3 one, that these were KPMG documents produced to the government;
4 and two, that they had been produced in discovery. The
5 prosecution elicited that testimony from him. I'm surprised
6 that he has that personal knowledge, but that's the testimony
7 that he has been brought here to deliver.

8 What we are doing is exactly the same thing. It is
9 directly relevant to what the prosecution proceeded to do with
10 this witness after having him testify about what the Bates
11 numbers mean. What they did after that, your Honor, is they
12 spent a while displaying documents to the jury that showed a
13 phone number association with Cindy Holder. In this document
14 there is a different phone number associated with Cindy Holder.
15 This document has the same KPMG-PCAOB Bates numbers as the
16 documents he has already testified about and said to the jury
17 that he can identify them in that manner as KPMG records.

18 These arguments that they go to the weight, not the
19 admissibility. The fact that they say how this was prepared,
20 they can bring a witness in to talk about that. But the fact
21 of the matter is when they asked for a phone record from KPMG,
22 they got this. I doubt that KPMG had its data entry people
23 type whatever this is, a thousand-page spreadsheet anew for
24 purposes of litigation.

25 What they did is they did something and extracted this

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Koch - Cross

1 information from KPMG's system. If that information that they
2 extracted from KPMG's system was produced to the government
3 with that Bates numbering scheme and based on the Bates
4 numbering scheme this witness is prepared to testify that these
5 are KPMG documents produced to the government, this stands on
6 exactly the same footing and is highly relevant and probative
7 evidence to rebut the argument they made for use of comparison
8 and display of documents that this witness identified on
9 exactly the same basis to attribute a phone number to Cindy
10 Holder.

11 The fact that this document that they asked for from
12 KPMG and that KPMG produced with the exact same methodology to
13 the government says something inconsistent with their case is
14 exculpatory evidence, it does not make it not admissible.

15 MS. KRAMER: Your Honor, first, I think it bears
16 noting that the defendant successfully moved to strike a
17 summary exhibit that was produced to us by the PCAOB collecting
18 data from a system that wasn't in evidence. This was something
19 that was prepared for litigation. The Bates number reflects
20 that, that it was produced to us, not as underlying a
21 foundation.

22 We inquired about the metadata for that and whether
23 there was a date. We were told that it was prepared for us in
24 the investigation from myriad sources that couldn't be retraced
25 and that it was in fact prepared long after the scheme in this

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Koch - Cross

1 case ended. So in terms of the timing, it is not accurate.

2 The number that is at issue in this case, the Cindy
3 Holder number, the business record that exists to identify what
4 that number was was received in evidence. There is no
5 foundation for this. It is hearsay. It was prepared for
6 litigation.

7 I think that defense counsel's attempt to put this in
8 when we have made a good faith representation to them of its
9 lack of reliability should not be countenanced.

10 THE COURT: I don't think that the last witness got to
11 authenticate Bates numbers. You don't get to authenticate a
12 document through Bates numbers.

13 MR. WEDDLE: Look at the testimony. It is pretty
14 clear.

15 MS. ESTES: That is absolutely not right. You guys
16 stipulated that those emails are from KPMG's server. We have
17 already offered most of them in evidence. The whole purpose
18 was for him to be to say these are emails that came from the
19 server, not that they are admissible as business records.

20 THE COURT: The connection of the Holder number was
21 clearly from a business record to a guest office where she was
22 working in an email where she said call me.

23 MS. ESTES: That one we offered. We did not establish
24 that there was a Bates number on that document at all. We did
25 the business records foundational questions for that document

J2rrmid6

Koch - Cross

1 and that's how we offered it.

2 MR. WEDDLE: That is Cindy Holder's email. That is
3 not a document made in the ordinary course of business to
4 prove --

5 MS. ESTES: It is better than that.

6 MR. WEDDLE: There are two documents, there may be
7 more. There may be a hundred documents that can come out of
8 KPMG with different identification of who this belongs to. It
9 is reasonable doubt.

10 THE COURT: That doesn't go to the evidentiary issue.

11 MR. WEDDLE: Your Honor, respectfully, I think it
12 would be very helpful to look at this witness's testimony on
13 direct and what exactly he purported to do with respect to
14 Bates numbers. Mr. Cook hasn't even asked him a question yet.
15 I think what Mr. Cook is going to do is ask him to look at it,
16 he is going to see if he can identify it on that same basis,
17 and then we are going to move from there. I think we should
18 take it step by step.

19 I think it would be very helpful to look at his direct
20 testimony. We didn't elicit his direct testimony. We didn't
21 call him as a witness to do this. The prosecution put him
22 forward to do this. We are doing exactly the same thing. If
23 he answers questions in the same way, and we'll see.

24 This document, your Honor, is clearly an extraction.

25 MS. ESTES: It is not. It totally is not.

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Koch - Cross

1 MR. WEDDLE: I can look at this document, and it
2 appears to be an extraction from a database with thousands of
3 people's names, including Cindy Holder and other people. If
4 you read across the line, it tells whether they are active or
5 terminated.

6 It was produced to us in exactly this form, your
7 Honor. It is a PDF document, not a spreadsheet, but it looks
8 to me like it was printed from a spreadsheet. Confusingly, you
9 have to look at two pages side by side.

10 For example, let's just use Holder because that is an
11 easy one. Here is Holder in line 173999, Cynthia Ann Holder,
12 terminated April 2017. If you imagine this as a spreadsheet,
13 it would go out into further columns. It is a PDF, so if we
14 jump ahead, the number is 17399.

15 THE COURT: Was this witness involved in the creation
16 of this?

17 MS. ESTES: He was not. The other phone number he is
18 referencing, the one we brought up there, it has a different
19 person's name there. That person started at KPMG months after
20 this email was sent, which just shows how irrelevant this
21 document is to Mr. Weddle's claim that this is Brady. That
22 person wasn't working at KPMG when the relevant call happened.

23 MR. WEDDLE: Your Honor, right now I'm talking about
24 Cynthia Holder. She has an assigned a 212 phone number in the
25 New York office. Remember, she is on the commuting plan. Her

J2rrmid6

Koch - Cross

1 number is 212-594-1417.

2 MS. ESTES: I don't think that changes the email.

3 MR. WEDDLE: That is the number. The prosecution
4 spent a long time displaying this email for the jury saying
5 call me at this number at a particular time. We talked about
6 time zones. I've said to your Honor before, the time zones,
7 the minute-by-minute situation in this case is going to be
8 important. It is important.

9 This Cynthia Holder phone number coming out of a
10 document produced by KPMG according to the same Bates numbering
11 scheme is probative of what number is Cynthia Holder's, which
12 is important when we get further into the case because there is
13 a phonecall that they are going to say is a phonecall from
14 Cynthia Holder to Jeff Wada, and I don't think they can prove
15 that beyond a reasonable doubt.

16 MS. ESTES: Your Honor, just to be clear --

17 MS. KRAMER: Could we be heard for a second?

18 MR. WEDDLE: Go ahead.

19 MS. ESTES: The phonecall that is relevant is on the
20 exact date of the email when she says call me at the number we
21 just displayed here, which is why I don't think this is
22 probative of anything when on the date of the relevant
23 phonecall she said call me at this number. We have told
24 counsel if they tell us what they want from the document we
25 would and try to work out a stipulation. We are not opposed to

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Koch - Cross

1 putting in something along those lines. But this is not right
2 document.

3 THE COURT: You are trying to get this witness to
4 authenticate this based on the Bates number? That is not
5 enough.

6 MR. WEDDLE: Your Honor, that is exactly the basis
7 that they did on direct.

8 THE COURT: I disagree.

9 (Continued on next page)

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J2rrmid6

Koch - Cross

1 (In open court)

2 BY MR. COOK:

3 Q. Mr. Cook, you testified on direct that in response to a
4 question from Ms. Estes, that generally speaking it is common
5 for emails produced by KPMG to reflect UTC time. Do you recall
6 that testimony?

7 A. Yes.

8 Q. I want to unpack that statement a little bit. You said
9 generally speaking. Does that mean that they don't always
10 reflect UTC time?

11 A. They do for our e-discovery processes, yes.

12 Q. What does that mean, for your e-discovery processes?

13 A. To normalize the time at the top of the header to UTC
14 across the emails so that it is normalized in the system.

15 MR. COOK: If we could pull up Government Exhibit 953.

16 Q. You testified concerning this email earlier. Do you recall
17 that?

18 A. Yes.

19 Q. I believe you testified that the time at the top of this
20 document 6:48 p.m., that is in UTC time, is that correct?

21 A. That's correct.

22 Q. The time below that, the first email chronologically, is
23 that also in UTC time?

24 A. No.

25 Q. Why is that?

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Koch - Cross

1 A. That is the way emails are constructed. That is part of
2 the body of the email. So it is text that was represented
3 there. That is not normalized. That is in whatever time zone
4 that the computer was set to that sent it or received it.

5 Q. So the only portion of an email thread, a chain of emails
6 that would be normalized to UTC time would be the top email,
7 most recent in time, that would be UTC, and the rest would be
8 the local time zone of the person who sent it?

9 A. Sent or received and depending on whose computer you got it
10 from or which side it was on. But yes, the very top is in UTC.

11 Q. For the second email in the chain, the email from Mr. Flynn
12 to Cindy Holder, is that time the local time for the sender or
13 the recipient?

14 A. It would have been represented by either Michael Flynn's
15 computer time or Cindy Holder's computer time depending on
16 which custodian to compute the email from.

17 Q. We know the custodian by the top email? Isn't that the
18 last person on the thread was the final custodian of the
19 document?

20 A. Yes. It was sent from Cindy Holder to Michael Flynn.

21 Q. Correct me if I'm wrong. Michael Flynn was the custodian
22 of that document as the final recipient?

23 A. I don't know. It depends. What I'm saying is when I say
24 custodian, I mean if we collected this -- if this email came
25 from Michael Flynn's computer as it was sent to him, then

J2rrmid6

Koch - Cross

1 that's one instance. The other instance is if it came from
2 Cindy Holder's sent items. Does that make sense?

3 Q. I'm trying. If the document came from Michael Flynn's
4 computer, if we can just assume that for a moment, what does
5 that tell us about the time zone for the second email in the
6 thread? That it would be local to Michael Flynn's computer or
7 local to Cindy Holder's computer?

8 A. My understanding is it would be local to Michael Flynn's
9 computer.

10 Q. If this came from, the top email again in Government
11 Exhibit 953, if this was extracted from Cindy Holder's sent
12 items, then that would tell us that the time reflected in the
13 email just underneath it is based on the local time of Cindy
14 Holder's computer? Do I have that right?

15 A. I believe so, that's correct.

16 Q. But there is no way to know from the face of the document
17 where it came from, whether from Michael Flynn's inbox or from
18 Cindy Holder's sent box, correct?

19 A. Not just from the face of it, no.

20 Q. So we can't know for every email below the top one, in this
21 case there is just one but assume there are many, we can't know
22 what time zone is reflected in all of those other emails in the
23 thread, is that right?

24 A. I think that's correct.

25 Q. If there are other emails in the thread from people --

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Koch - Cross

1 withdrawn. Let me start over. Let's assume this was a more
2 lengthy email that included other people other than Mr. Flynn
3 and Ms. Holder lower down in the thread, earlier emails. And
4 let's assume that this email came from Cindy Holder's sent
5 items box. Can we determine the time zone of emails much
6 earlier in the thread that involved people not involved in the
7 Flynn-Holder email at the top? I hope you followed that.

8 A. I would need to do a little digging on that to say. I'd be
9 speculating.

10 Q. Fair enough. The bottom line is we can't know what time
11 zone is reflected in this email sent on March 28, 2016, based
12 on Government Exhibit 953 as we see it here?

13 A. I'm sorry. Can you ask that question again?

14 Q. Sure. We can't know what time zone is reflected in the
15 second email in this thread based on just looking at Government
16 Exhibit 953 alone?

17 A. That's correct.

18 Q. Let's take a look at Government Exhibit 1309. You
19 testified regarding this concept of hoteling, is that correct?

20 A. Yes.

21 Q. As I understand it, that's when a KPMG employee visits an
22 office they are based in and they are assigned some office
23 space, is that right?

24 A. Yes.

25 Q. Can you tell us, does Government Exhibit 1309 have a name,

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Koch - Cross

1 colloquial name, that you would refer to in the ordinary course
2 of business?

3 A. It would be a record from our voice systems, from our
4 computers that run or telephone systems.

5 Q. So this relates to assigning telephone numbers or to
6 visiting offices?

7 A. This particular record is a reflection of that, yes.

8 Q. Correct me if I'm wrong. It does not reflect the actual
9 physical location that somebody will be in; it reflects the
10 phone number that is assigned to them while they are in a
11 particular building?

12 A. It does reflect a physical location of our New York office.
13 That would be at 345 Park. But that's as granular as it gets.

14 Q. So we can't tell from 1309 the actual office space that is
15 being used by any particular individual that is assigned a
16 phone number here?

17 A. That's correct.

18 Q. Let's use the New York office as an example. When somebody
19 comes to visit that office, how does a phone number get
20 assigned to that person?

21 A. Through the hoteling system it will pull one out of the
22 pool or there is one assigned to the phone when you show up at
23 whatever office you've gotten assigned to you.

24 Q. What is the mechanics of that process? If I'm a KPMG
25 employee visiting the New York office, how do I get assigned to

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Koch - Cross

1 a particular phone number? What do I do?

2 A. I don't know the mechanics of it.

3 Q. Fair enough.

4 A. I ask my admin to set it up and she does it.

5 Q. I understand completely. Who creates, who inputs the data
6 into Government Exhibit 1309?

7 A. This wasn't necessarily input. Like when I looked at it,
8 it was the record that was pulled up, so it existed already.

9 That is a number that is in a guest pool in New York, and
10 that's just the way the pool has been since it's been created.

11 Q. If we could zoom in on the left-hand portion beginning with
12 the directory number. It is your testimony that this number,
13 212-594-2251, I believe you said it is assigned to a guest
14 pool?

15 A. Yes.

16 Q. So it is a pool of numbers that is available for use if
17 somebody is visiting?

18 A. Yes, temporary numbers.

19 Q. That particular phone number, is it assigned to a
20 particular office within the New York office?

21 A. I don't believe so.

22 Q. If a person is visiting the New York office and at
23 receptions you have been assigned for this hoteling program to
24 office number 5, for example, do they also get a new phone
25 number for that office or do they just use the number that is

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Koch - Cross

1 already assigned to that office?

2 A. It could probably be either way. The numbers are not tied
3 directly to the offices.

4 Q. So this phone number could be assigned to multiple offices
5 depending on circumstances?

6 A. It's in a pool for the New York office on 345 Park. But
7 yes, within that building it could exist at different
8 locations.

9 Q. The system that you are talking about that includes this
10 information, does it record the history of the assignment of
11 this phone number? In other words, to whom it was assigned on
12 various days and times?

13 A. No, I don't believe so.

14 Q. There is no way to tell from this record, Government
15 Exhibit 1309, whether or not it was assigned to a particular
16 person or a particular physical office on any particular day,
17 is that right?

18 A. Correct.

19 MR. COOK: No further questions. Thank you.

20 THE COURT: Any redirect?

21 MS. ESTES: No, your Honor.

22 THE COURT: Thank you. You may step down.

23 (Witness excused)

24 THE COURT: Are you going to have another witness
25 today?

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Greenwood - direct

1 MS. ESTES: Yes, your Honor. We have Zachary
2 Greenwood here.

3 THE COURT: Does it make sense to go ahead and do it?

4 MS. ESTES: I think so. He is a pretty short witness.
5 We may not finish him.

6 THE COURT: How short is he, 5-6, 5-5? Courtroom
7 humor. Go ahead and bring him in.

8 ZACHARY GREENWOOD,

9 called as a witness by the government,

10 having been duly sworn, testified as follows:

11 THE COURT: Ms. Estes.

12 DIRECT EXAMINATION

13 BY MS. ESTES:

14 Q. Good afternoon.

15 A. Good afternoon.

16 Q. Where do you work?

17 A. I'm currently employed by the United States Secret Service
18 as a network intrusion forensic analyst.

19 Q. What does it mean to be a network intrusion forensic
20 analyst?

21 A. My primary responsibilities are to analyze digital evidence
22 that is brought into our lab or initiated through a case. That
23 is, I analyze things such as computers, cell phones, network
24 devices for evidence of a crime. In particular, I have focuses
25 on intrusion, such as hacking-based crimes, as well as helping

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Greenwood - direct

1 our local electronic crime task force partners for a variety of
2 crimes, from sexual assault, homicide, money laundering, and
3 other financial related crimes.

4 Q. How long have you worked for the Secret Service?

5 A. I have been employed there since July of 2018.

6 Q. Before you worked at the Secret Service, where did you
7 work?

8 A. Prior to that I was employed by the United States Postal
9 Inspection Service for approximately two years as a computer
10 forensic analyst.

11 Q. What were your duties and responsibilities in that
12 position?

13 A. My duties were very similar to those that I maintain now,
14 but the crimes that I focused on related to those that the
15 postal service handles.

16 Q. Before you joined the United States Postal Inspection
17 Service, what did you do?

18 A. I was a director of digital forensics at Precision
19 Discovery. Precision Discovery is a private electronic
20 discovery and digital forensic firm. That is, we specialize in
21 massive review of electronic documents like emails, Word
22 documents, and digital forensic investigations for civil
23 clients.

24 Q. Before you worked at Precision Discovery, what did you do?

25 A. Prior to that, I was employed by the Manhattan district

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Greenwood - direct

1 attorney's office in several roles -- as a trial preparation
2 assistant, an investigative analyst -- where my primary duties
3 were drafting legal documents, such as subpoenas, search
4 warrants, reviewing wiretap records, and also analyzing data
5 for other cases. Following that, I was employed in their
6 high-tech analysis unit as a computer forensic analyst with
7 duties similar to that of my current job but with crimes
8 focused in the County of Manhattan.

9 Q. Mr. Greenwood, are you familiar with the term "forensic
10 extraction"?

11 A. I am.

12 Q. What is that?

13 A. A forensic extraction, in terms of mobile devices in
14 particular, is the process by which data is acquired from a
15 mobile device, such as a cell phone, iPhone, or Android, where
16 the contents are extracted out into another container format,
17 minimally modifying, if at all modifying, the contents of the
18 original device.

19 Q. Have you been involved in performing forensic extractions
20 in your positions at the Secret Service, the United States
21 Postal Inspection Service, and your other jobs?

22 A. Yes.

23 Q. Have you received training on forensic extractions?

24 A. Yes.

25 Q. What kind of training?

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Greenwood - direct

1 A. I received in the hundreds of hours of forensic training
2 from a variety of sources. Much of my training has been
3 in-house, that is, provided by my prior employers. I have also
4 received dozens upon dozens of hours from the National
5 White-Collar Crime Center in digital forensic acquisition and
6 analysis and as well as from SANS, S-A-N-S, the Sys Admin Audit
7 Network and Security, a global provider of information security
8 certifications in computer forensics.

9 Q. Mr. Greenwood, are you familiar with Cellebrite?

10 A. Yes.

11 Q. What is Cellebrite?

12 A. Cellebrite, a combination of software and hardware that is
13 used in the digital forensic field for digitally extracting
14 data from a mobile device.

15 Q. Have you received training on Cellebrite?

16 A. Yes.

17 Q. Over the course of your career, approximately how many
18 forensic extractions of cell phones have you performed?

19 A. I would say the number is in the thousands.

20 Q. How many of those were iPhones?

21 A. I couldn't say exactly, but I would say over a third to a
22 half.

23 MS. ESTES: Your Honor, at this time I would like to
24 read part of a stip between the parties.

25 THE COURT: Yes.

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Greenwood - direct

1 MS. ESTES: Mr. Urbanczyk, can you pull up for me
2 Government Exhibit 1379.

3 The stip has a preamble that it is stipulated and
4 agreed by parties. Then it states:

5 1. On March 17, 2017, David Middendorf voluntarily
6 surrendered his personal cellular telephone, an iPhone bearing
7 serial number F2LRL53WGRWT (the Middendorf cell phone) to
8 counsel for KPMG. Also on March 17, 2017, a forensic image was
9 taken of the Middendorf cell phone by a vendor retained by
10 counsel for KPMG. Thereafter, a copy of the forensic image of
11 the Middendorf cell phone was provided to the United States
12 Attorney's office.

13 Your Honor, at this time we offer the stipulation
14 Government Exhibit 1379.

15 THE COURT: Received.

16 (Government's Exhibit 1379 received in evidence)

17 MS. ESTES: Mr. Urbanczyk, you can take that down.

18 Q. Mr. Greenwood, in connection with your work at the United
19 States Postal Inspection Service, were you involved in the
20 analysis of phone dad from phones from David Middendorf and
21 Brian Sweet?

22 A. Yes, I was.

23 Q. How did you receive that data?

24 A. These were received from postal inspectors at the United
25 States Postal Inspection Service that delivered a hard drive

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Greenwood - direct

1 containing previously extracted devices, that is, just the raw
2 data taken from those phones.

3 Q. In what form was the raw data?

4 A. The data was in the form of a TAR file, T-A-R, and a .ufd
5 file. The TAR file can be thought of as the extraction put
6 into a compressed format. The UFD file is a pointer for that
7 file and indicates details about the extraction. That also
8 indicates to me that the tool used to extract these devices was
9 the UFED, or universal forensic extraction device.

10 Q. What is the UFED?

11 A. UFED is the combination of software and hardware that is
12 Cellebrite that I spoke of earlier.

13 Q. What did you do when you received this data?

14 A. Based on instruction provided to me, I took the extractions
15 after write-blocking the hard drive, that is, preventing any
16 modification for that original data that I received, made two
17 copies of it, one for our archiving purposes and one to be used
18 as a working copy.

19 From there I loaded them in the UFED physical
20 analyzer, a software suite used to parse or render out the
21 contents of the phone data. That is, the raw data is
22 unstructured. After it is pushed through the Cellebrite
23 physical analyzer, I can see things such as text messages,
24 notes, photos, etc.

25 Q. After you pushed through the data through the Cellebrite

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Greenwood - direct

1 analyzer, is there any sort of report generated?

2 A. Yes. After the data was ingested into this, a portable
3 case file was created of this data for further review by
4 inspectors and the U.S. Attorney's office.

5 Q. Did you have any involvement in that further review?

6 A. No.

7 MS. ESTES: Your Honor, may I approach?

8 THE COURT: Yes.

9 Q. Mr. Greenwood, I have handed you what's been marked for
10 identification as Government Exhibit 656-D. Do you recognize
11 this CD?

12 A. I do.

13 Q. How do you recognize it?

14 A. I recognize this based on the label affixed to it and the
15 date and initials, which are mine. I created the CD.

16 Q. Did you review the contents of the CD before your testimony
17 today?

18 A. Yes.

19 Q. What is contained on the CD?

20 A. This CD contains partial extraction or partial report of
21 some of the data from that first phone. It contains photos and
22 I believe Notes data.

23 Q. Is that from the Middendorf phone?

24 A. Yes.

25 Q. Does it contain the full Notes data or a selection of it?

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Greenwood - direct

1 A. It contains the full Notes data.

2 Q. Does it contain the full photo data or just a selection of
3 IT?

4 A. No, just a selection.

5 MS. ESTES: Your Honor, the government offers
6 Government Exhibit 656-B.

7 THE COURT: Received.

8 (Government's Exhibit 656-B received in evidence)

9 MS. ESTES: Mr. Urbanczyk, can you please publish.

10 Q. Mr. Greenwood, what are we looking at here?

11 A. This is the report contained on this CD 656-B. It is the
12 UFED reader report that allows for navigation and review of
13 the contents of this phone.

14 Q. Looking at the extraction summary there, can you tell what
15 kind of phone this was for?

16 A. This was reported to be an Apple iPhone 6S Plus.

17 Q. Mr. Greenwood, looking at the data on the left there, where
18 it says "Notes," what does that contain?

19 A. In there are IOS Notes. That is the Notes function from an
20 Apple IOS or iPhone device.

21 MS. ESTES: Mr. Urbanczyk, can you click on the notes.

22 Q. Mr. Greenwood, how many notes are listed there?

23 A. There are 27 notes listed here.

24 Q. Mr. Greenwood, can you run any sort of reports from this
25 UFED reader?

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Greenwood - direct

1 A. Yes.

2 Q. What kind of report?

3 A. Reports can be generated in several different formats.

4 That is the portable case, like this is now, or HTML, PDF,
5 Word, a variety of reports for review.

6 MS. ESTES: Mr. Urbanczyk, can you pull up what's been
7 marked for identification as Government Exhibit 656-A.

8 Q. Mr. Greenwood, do you recognize this?

9 A. I do.

10 Q. What are we looking at here?

11 A. I recognize this to be a PDF report of the notes extracted
12 from this device.

13 MS. ESTES: Your Honor, the government offers
14 Government Exhibit 656-A.

15 THE COURT: Received.

16 (Government's Exhibit 656-A received in evidence)

17 MS. ESTES: Your Honor, I would note it is 4:59. This
18 might be a logical stopping point before we go through this
19 document.

20 THE COURT: We will break for the evening, ladies and
21 gentlemen. Please leave your pads on your chairs. Remember
22 you are not yet deliberating so please don't discuss the case
23 with each other or with anyone else. We will continue at 9:30
24 tomorrow morning and break at 4 o'clock tomorrow afternoon.
25 Have a good night everybody.

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1 (Jury not present, witness not present)

2 THE COURT: I'll start by asking the government where
3 we are in terms of witnesses and what's on the schedule for
4 tomorrow.

5 MS. ESTES: Your Honor, after Mr. Green wood, we do
6 expect to read some text messages and emails. We have Brian
7 Sweet and Mark Rubino tomorrow as well, then a summary chart
8 witness. And we have a couple of stipulations to go through as
9 well.

10 THE COURT: You said finish Mr. Greenwood, reading
11 texts?

12 MS. ESTES: Reading text messages, reading emails.

13 THE COURT: Sweet and Rubino?

14 MS. ESTES: Yes, and then a summary chart witness, two
15 summary chart witnesses.

16 THE COURT: Have you all reached agreement on where in
17 that order you are planning to have Mr. Blake?

18 MR. BOXER: I was intending to have him here at noon,
19 12:30, figuring by 2 o'clock it would be safe. Perhaps they
20 will have rested by then. I think he is probably 20 minutes to
21 a half hour of direct. I don't know how close we want to cut
22 it to the 4 o'clock promise, but it seems like it's going to
23 work out.

24 THE COURT: Does that make sense to you?

25 MS. ESTES: Yes, your Honor.

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1 THE COURT: Anything else you all wanted to talk
2 about?

3 MS. MERMELSTEIN: Yes, your Honor. I understand Mr.
4 Boxer's point about not having to proffer everything the
5 witness is going to say, and we are not asking for that. But
6 there are statements in Mr. Blake's I call it 3500, I know that
7 is not really the right reference, but in his 3500 material
8 that I think are wholly improper testimony.

9 We are not suggesting that everything in there is
10 going to be elicited. But I think it is fair to say either
11 there should be a proffer that that is not going to be elicited
12 or we should understand that defense counsel thinks that is
13 proper testimony so we can fight about its admissibility before
14 we have the witness on the stand and we are objecting to
15 questions and having lengthy sidebars. I think Hanson is more
16 complicated, but he is not testifying this week, so let's not
17 go down that road.

18 With respect to Mr. Blake, I think that his testimony
19 about his own view about the value of inspection results and
20 that he didn't care about them is of questionable
21 admissibility. But we are not going to fight about that. He
22 has three things in his 3500 material that I think are
23 completely inappropriate. This is in our letter which I
24 realize now doesn't have page numbers, but it is on page 3.

25 He had a perception of the PCAOB as a political

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1 organization and a government bureaucracy interested in
2 expanding its power; that with regard to the hiring of PCAOB
3 personnel by KPMG, that's the way regulatory agencies work; and
4 that he was not aware of any interaction between the PCAOB and
5 the SEC, and that it makes no sense that the issues of the
6 PCAOB are the issues of the SEC.

7 I can't see any relevance whatsoever to some person's
8 understanding of it. He is not an auditor. He didn't interact
9 with the SEC as Mr. Middendorf did directly. So it is
10 completely irrelevant that he doesn't know a particular thing
11 to be true that is true. And his general clearly fairly
12 uneducated understanding of the PCAOB which he thinks is a
13 government bureaucracy -- it is in fact not a government
14 entity -- is somewhere between irrelevant and complete
15 speculation. I think it is both.

16 So none of these are appropriate to have someone who
17 is not a proper witness to it opine on important issues that he
18 has no personal knowledge of, no foundation for, and in many
19 cases which he is wrong about. So we don't think that is
20 appropriate. If defense counsel is intending to do it, we
21 think they should be precluded from doing it

22 MR. BOXER: I think that presentation highlights why I
23 think this approach is inappropriate, no less for the
24 defendant, who doesn't have a burden whatsoever. I think Mr.
25 Blake will be able to establish his ability to have a view on

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1 PCAOB and his relationship with the SEC. He was the CEO of
2 Home Depot for many years. He is the chairman of the board of
3 Delta Air Lines. He was the chair of various audit committees
4 of public companies. We are calling him largely for his
5 interaction with Mr. Middendorf.

6 THE COURT: Not specific instances but opinion or
7 reputation of character?

8 MR. BOXER: And based on specific instances. Mr.
9 Middendorf was the engagement partner of Home Depot for 5 years
10 while Mr. Blake was the CEO, and he met with him regularly.

11 He is also, as they have conceded, going to testify
12 about whether inspection results had any bearing on his view of
13 KPMG or whomever the accounting firm was for the audit
14 committee he was chair of. He was on a few.

15 As far as the more general topics about whether his
16 view on the bureaucracy of the PCAOB, I don't intend to go
17 there. As far as his view of the SEC and the PCAOB's influence
18 on the SEC, I'm not sure whether I'm going to go there or not.
19 But if I do, I'll lay an appropriate foundation for that.

20 Their whole burden is about how Mr. Middendorf had the
21 intent to defraud the SEC. If he can provide relevant evidence
22 on that topic, I think we are permitted to elicit it. As I sit
23 here today or stand here today, I'm not sure if I'm going to do
24 that. But I don't think I'm required to lay out my direct in
25 the defense case so they can try to preempt what we do or do

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1 not do with the witness.

2 I don't expect a big area of dispute. As you heard,
3 they don't contest, and it is in their letter, that Mr. Blake's
4 views on the impact of inspection reports on him as a client of
5 the firm and as the chair of an audit committee is admissible.
6 And he certainly had a lot of personal dealings with Mr.
7 Middendorf. I think it is about 20 minutes, 30 minutes. I
8 don't expect there to be any big issues.

9 MS. MERMELSTEIN: I'm completely baffled. What we
10 have just heard makes clear there are big issues. I can't
11 understand how it is improper for the government to try and
12 raise evidentiary issues with the Court in advance of testimony
13 so that we are not objecting in real time and having improper
14 questions put to witnesses.

15 Number one, I think it is important that it be clear
16 that he can opine on his thoughts about how this matter
17 affected him but he can't opine on this matter generally to
18 other people who he is not one. His general opinion about the
19 relationship between the SEC and PCAOB is as relevant as my
20 opinion: it matters zero. The question is what was in Mr.
21 Middendorf's head.

22 MR. BOXER: I said that, your Honor.

23 MS. MERMELSTEIN: So what is the relevance of Mr.
24 Blake's --

25 MR. BOXER: I don't have to explain to her how I may

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1 or may not get it.

2 MS. MERMELSTEIN: I think you do. I don't think you
3 can say the testimony might be improper but I'm not going to
4 answer whether or not I'm going to put that question to the
5 witness. If it is improper, it should be precluded. Mr. Boxer
6 doesn't have to say he is going to go there, but then we would
7 like a ruling that that question is inappropriate because Mr.
8 Blake's knowledge has no impact whatsoever on Mr. Middendorf.
9 Mr. Middendorf met with the SEC directly. The notion that
10 other people don't have an understanding of that relationship
11 is wholly irrelevant.

12 I'm concerned. Mr. Boxer just answered in respect to
13 your Honor's questions about character evidence that he does
14 intend to elicit specific incidents of conduct. We generally
15 discussed this letter with Mr. Boxer, who said he obviously is
16 going to abide by the clear rules of character evidence
17 testimony, which are very clear that you can't go into specific
18 instances of conduct.

19 And I don't want to be objecting to that testimony in
20 real time which is tell me about this great particular thing he
21 did, objection. It shouldn't be put to the witness in the
22 first instance. We shouldn't have to object. So I do think
23 some guidance from the Court and ruling about what is going to
24 be permitted is appropriate both with respect to the character
25 evidence and with respect to this issue about the SEC.

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1 THE COURT: As to character evidence, I think the rule
2 is pretty clear that the defendant is limited to evidence of a
3 person's character or character trait is admissible when it is
4 admissible. That is, if it's pertinent, it may be proved by
5 testimony about the person's reputation or by testimony in the
6 form of an opinion and not specific acts. That's pretty clear.
7 That is very short testimony, I think.

8 MR. BOXER: Yes. And I think the witness has to have
9 a basis for that opinion.

10 THE COURT: But if the basis is specific acts, he
11 can't be testifying to them.

12 MR. BOXER: He can testify that he knew him for five
13 years, he met with him every quarter, he was the lead auditor.

14 THE COURT: I think he can testify to the foundation
15 for having an opinion.

16 MR. BOXER: Yes. Otherwise, the opinion doesn't have
17 much relevance.

18 THE COURT: I think that's right. But when you get
19 into specific examples of good conduct, that is exactly what is
20 precluded. I also have to say I'm not sure why his view on the
21 PCAOB or the SEC is relevant.

22 MR. BOXER: The reason it is relevant is because
23 throughout the case and with I think every witness they have
24 elicited that KPMG was literally in crisis because its
25 inspection results were so poor and that it was desperate to

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1 improve its inspection results. Through Mr. Sweet, but maybe
2 even through Mr. Whittle, they talked about client
3 opportunities.

4 Here is a client. Here is a CEO who is going to say
5 whether they had five comments or four comments, none of it
6 mattered to him. So the motive, the intent that Mr. Middendorf
7 would commit a fraud because he needed to improve the
8 inspection results is contradicted by his client's testimony
9 that that's not the case, that he didn't care about the
10 inspection results.

11 THE COURT: I think that is exactly what he can
12 testify to, but sort of generalized opinion about the PCAOB
13 being political.

14 MR. BOXER: Absolutely. That is what I was trying to
15 address before. I agree.

16 THE COURT: And he doesn't have personal knowledge of
17 the relationship between the PCAOB and the SEC.

18 MR. BOXER: I think he does have personal knowledge.
19 He is a pretty experienced person with the SEC. But we are not
20 calling him as an expert witness to opine on the relationship.
21 I think he could answer all those questions based on personal
22 knowledge. He sat on audit committees for 20 years. I think
23 he understands the process and relationship. But we are not
24 calling him for that purpose.

25 MS. MERMELSTEIN: Just so it is clear, there won't be

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1 questions put to this witness about his views of the PCAOB or
2 relationship between the PCAOB and the SEC. He will be allowed
3 to describe in general terms the nature of his relationship
4 with Mr. Middendorf as the foundation for either/or his own
5 opinion as to Mr. Middendorf's whatever relevant trait,
6 trustworthiness, etc., and if he can lay the foundation Mr.
7 Middendorf's reputation in their respective community for that.
8 Then he can testify that as a member or head of an audit
9 committee he personally did not care about inspection results.
10 That seems fine. I think anything beyond that seems
11 problematic.

12 MR. BOXER: That's my intent. There is definitely a
13 foundation to be laid for both of those areas. As I said, I
14 don't special agent an issue but, I think I have said before, I
15 don't think I have to preview entire examination. But that's
16 our plan.

17 THE COURT: Fair enough. Anything else anybody wanted
18 to address?

19 MS. MERMELSTEIN: Not from the government, your Honor.

20 MR. WEDDLE: One thing. With respect to the text
21 messages that I think the government proposes to read, we have
22 been in communication with the government about text messages.
23 They have certain text messages that they want to offer. We
24 have some additional chats that we would like to offer. We
25 also have some chats that basically encompass their excerpt and

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1 provide additional context to it.

2 THE COURT: Right. This is something that was raised
3 before. Is this the rule of completeness relating to texts?

4 MR. WEDDLE: I think the rule of completeness issue
5 has really fallen away, your Honor. We have discussed and they
6 have incorporated some of our suggestions. There are some that
7 they don't agree with. But I think we just have alternative
8 versions.

9 It is not that theirs is deceptively incomplete such
10 that we are relying on the rule of completeness. We just think
11 that there are additional texts that we would propose that are
12 also admissible. By and large the government I think doesn't
13 object to the admission of those. There are some where some of
14 the texts that we propose to offer the government does object
15 to, I think mostly on hearsay grounds but there are some other
16 objections as well. I don't want to speak too much for Ms.
17 Estes.

18 What I would request, your Honor, is just that at a
19 convenient time for the Court perhaps we could go through our
20 proposals line by line. It is text message by text message
21 really. And very briefly talk about them and say this one is
22 not for its truth so this one think they is hearsay, we think
23 it is state of mind, and run through them quickly at a time
24 when we don't have to waste the jury's time. That is one issue
25 I wanted to put out there.

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1 The second is that of course the government is calling
2 someone who is going to read the documents that are going to be
3 in evidence that we are not objecting to which are the
4 government's excerpts. For our excerpts, I propose that we
5 have that person read our excerpts. It is sort of like a
6 cross-examination. I think the government doesn't agree to
7 that. That is our proposal.

8 THE COURT: Are you talking about the texts still?

9 MR. WEDDLE: It's not a stip. It is just different
10 excerpts.

11 THE COURT: Of texts or emails or something else?

12 MR. WEDDLE: Just texts.

13 MS. ESTES: Your Honor, these are text messages that
14 Enrique Santos authenticated last week. We intend to offer the
15 exhibit, and then we just intended to have one of our
16 paralegals, Mr. Cooney, read them from the witness stand.

17 What we would object to is having our paralegal read
18 defense exhibits. This is our case. We are going to offer our
19 exhibits. We are not going to object to a number of their
20 defense exhibits and we are not going to object to their
21 authenticity. We are not going to make them recall Mr. Santos
22 or anything like that. But we think they should have to
23 present their own exhibits in their case.

24 I would note something like this proposal has been
25 raised in other cases. Specifically in United States v.

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1 Galanis, 16 CR 371, Judge Abrams expressly rejected this
2 argument when defense counsel tried to make it in the case. We
3 should not in the government's case have to put on defense
4 exhibits. If they want to put on a case, they are certainly
5 entitled to, but they have to do it in their own case, not in
6 the government's case.

7 THE COURT: Let me go back to the first issue about
8 the texts. How much of a volume of judgment calls are here
9 that I am going to have to make?

10 MR. WEDDLE: I think it is 10 conversations. Most of
11 them are less than a page. So 15, 20 text messages back and
12 forth. Some of them are two pages. Many of them are questions
13 or greetings or something like that. So out of 10 excerpts
14 there are probably 20 potential hearsay objections.

15 MS. ESTES: Your Honor, I would note that the
16 objections are with the defense exhibits, so I think we could
17 take this up after the government has rested, take up the
18 questions of these objections.

19 THE COURT: I don't think it is proper for me to
20 require the government to put them in. Unless it is rule of
21 completeness, I don't think it is right for me to have the
22 defense offer portions necessarily unless it is agreed upon.

23 MR. WEDDLE: So we will do that on our defense case.

24 THE COURT: Yes.

25 MR. WEDDLE: At some point prior to that at a

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1 convenient time for the Court it might be helpful to go through
2 that.

3 THE COURT: Okay. In terms of in case the jury is
4 wondering if we are still on crack for four weeks, I know I
5 can't promise anything, do you all think we are on track for
6 going to the jury next week? If you don't want to tell me, you
7 don't have to.

8 MR. BOXER: We were discussing this at the last break.
9 It seems like it does.

10 MS. MERMELSTEIN: In that regard I wonder if it is not
11 too early to talk about when we are going to have a charge
12 conference. It seems to me depending on the length of the
13 defense case, it could be as early as Tuesday.

14 THE COURT: That's a very good question.

15 MR. BOXER: We have some decisions to make, your
16 Honor. We will for sure have some witnesses on Monday. Then
17 there are a few that we will decide over the weekend. So I
18 think Monday morning we will have a lot more clarity,
19 hopefully.

20 THE COURT: We could have a charge conference Monday
21 afternoon.

22 MS. MERMELSTEIN: Your Honor, I'd be inclined not to
23 wait that long. I appreciate the defense is still figuring out
24 the defense case. But it is often the case that the defense
25 case gets stripped down. If we are closing on Tuesday, this

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1 is, as everyone knows, a case where there is likely to be more
2 than the average amount of fighting about the charge. We are
3 going to make submissions and need to have more clarity on what
4 it is. I think given the possibility closings will be on
5 Tuesday, we ought to do it before that. I don't know what
6 people's availability is, including my own team, but either
7 Thursday after court or Friday sometime.

8 MR. BOXER: Your Honor, we sat last Friday after
9 numerous requests to keep the trial moving. We are now almost
10 over. Speaking for my time, we could certainly use the Friday
11 to get ourselves ready for next week. If we rest on Monday, we
12 can do a charge conference on Tuesday. I don't quite see the
13 prejudice or harm. I don't know how long the case is going to
14 be for Mr. Wada, but we need to have a conference before the
15 summation. I don't know why we need it earlier than that.

16 MS. KRAMER: I can only speak for myself, your Honor.
17 I have blank pages right now in terms of what the Court is
18 going to charge on some critical issues. If, for example, we
19 have the charge conference Monday and we were closing Tuesday
20 morning, that is very little time to incorporate your Honor's
21 rulings on some of these issues.

22 We don't have a sense. We have not gotten definitive
23 answers on whether the defense has decided not to call any
24 particular witnesses on their list, and that's fine. They are
25 thinking about it. But it does sound like they could rest on

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1 Monday. If we are going to close Tuesday, we need some time, I
2 at least need some time, to incorporate the rulings on the
3 charge into the closing argument.

4 THE COURT: I have started working on the charge, but
5 I don't have a complete draft yet. We could have an initial
6 charge conference tomorrow at 4 o'clock after we break. I
7 don't know that I will have a complete draft at that point. Or
8 we could do Friday, or Monday morning or Monday afternoon Cook
9 what are. What are the odds that you are going to be closing
10 on Tuesday?

11 MR. COOK: That seems unlikely. That is pretty
12 optimistic. Wednesday seems like the earliest possible
13 closing. On behalf of Mr. Wada, we have no problem with having
14 the conference on Monday. However, as we will be preparing the
15 summation, it will be helpful if your Honor has made a decision
16 on whether the Court intends to adopt Judge Abrams on
17 willfulness issue, it would be helpful ton that because it
18 would help frame the arguments.

19 (Continued on next page)

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1 THE COURT: At this point, I think I probably will
2 adopt Judge Abrams' version of willfulness.

3 MR. COOK: Thank you, your Honor.

4 THE COURT: We can address it further at the charge
5 conference.

6 Ms. Lester.

7 MS. LESTER: Your Honor, this is with respect to a
8 summary chart that I think the government intends to offer
9 tomorrow. It's been sent to us as Government Exhibit 1371,
10 which is the summary from the two witnesses who testified today
11 from the PCAOB about the hourly rates of various employees and
12 then the planning time.

13 The summary chart -- I don't know if someone would be
14 able to pull it up for the Court a little bit. Thank you.

15 (Pause)

16 The summary chart includes a column that says "Cost
17 (hourly rate times hours)" at the top. We object to -- first
18 of all, as the Court knows, we sort of object to the
19 calculation of any cost in general. We think that the
20 testimony and documents now together make clear that the hours'
21 calculations are based on scheduling, not actual hours worked.
22 We don't quibble with the hourly rate in the sense that these
23 are salaried employees and if you break down their salary for a
24 40-hour workweek, that's their hourly rate eight hours a day.

25 But to calculate in this way a supposed cost and for

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1 the government to argue that that reflects an actual cost
2 expended by the PCAOB is improper for the reasons we've already
3 articulated but I can articulate again for the Court. These
4 are all salaried employees who would have been paid regardless
5 of what they were working on. And to the extent the government
6 is going to argue that this goes to a loss or a harm to the
7 PCAOB, we think that's improper.

8 To the extent they're arguing that this is merely a
9 representation of the value of the list information, we think
10 that this exhibit should be reconfigured so that the term
11 "cost" is not used.

12 I'm not sure exactly what the government intends to
13 argue in summation from this exhibit, but those are our
14 objections.

15 MR. OHTA: Mr. Wada joins, your Honor.

16 THE COURT: Would you like to respond?

17 MS. MERMELSTEIN: If your Honor would like me to?

18 I think the -- I won't recite the argument about the
19 admissibility of this evidence generally. It is obviously
20 already in evidence. I think cost is perfectly accurate. And
21 to the extent there is any uncertainty of what that means, the
22 chart itself lays out that it is what that calculation means.

23 The idea that because an entity has salaried
24 employees, the cost of those employees is not a cost to the
25 entity is simply wrong. A manufacturing company that pays

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1 employees to work in the manufacturing plant pays those
2 employees a salary, and that comes at a cost that factors into
3 the costs of the company and employees that are doing one thing
4 can't be doing another. So the fact that it's a sunk cost with
5 respect to these employees does not mean that it is not a cost.

6 And I think that it is perfectly reasonable for the
7 government to argue, in a case where the defendants say this is
8 not property, that it comes at enormous expense and effort to
9 the PCAOB. I don't think there is anything -- this chart
10 represents a literal mathematical calculation of documents that
11 are in evidence, and the cost, which is defined clearly as the
12 hourly rate by hours, is clearly indicated for the jury. And
13 the defense is welcome to argue in summation that that's not a
14 reasonable way to think about it or it shouldn't be thought
15 about that way. I don't think that there is anything about the
16 chart that needs to be changed.

17 THE COURT: So, who is the witness who is going to
18 testify about the summary chart?

19 MS. MERMELSTEIN: Mr. Urbanczyk is going to do it,
20 your Honor.

21 THE COURT: OK.

22 MS. MERMELSTEIN: It is a chart -- as you can see,
23 it's literally -- I may get the government exhibit wrong but
24 it's Government Exhibit 132, or whatever the 2015 planning
25 numbers are with two columns inserted. One is people's hourly

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1 rates from government Exhibit 131A and then a calculation
2 across.

3 THE COURT: Yes. I'm going to overrule the objection.
4 I don't find that the word "cost," which is just -- that it is
5 so prejudicial that it makes it something other than a summary
6 chart. So, I am going to overrule the objection.

7 Anything else you all want to talk about tonight? I
8 didn't say anything definitively on the charge conference. Let
9 me reassess where I am in the charge and try to figure out
10 whether it is going to be Friday or Monday.

11 If it were Friday, could it be Friday afternoon, or
12 does that pose particular problems, say for an hour on Friday
13 afternoon?

14 MR. BOXER: We don't have any particular problems.
15 Whenever your Honor's schedule permits.

16 THE COURT: Just general problems.

17 MR. BOXER: Just generally. We will be available when
18 you would like us, your Honor.

19 MR. COOK: The same, your Honor. However, could
20 Mr. Wada be excused from participation in the conference?

21 THE COURT: Yes, if that is OK with him.

22 MR. BOXER: Yes. If it is Friday, we would likely
23 make the same request. If it is Monday, we may not.

24 (Continued on next page)

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1 THE COURT: OK. We will decide tomorrow. All right?

2 MS. MERMELSTEIN: Thank you, your Honor.

3 THE COURT: All right. Have a good night, everybody.

4 (Continued on next page)

5 (Adjourned to 9:30 a.m. February 28, 2019)

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